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TO THE RIGHT HONOURABLE

SIR FRANCIS GRAHAM MOON, BART.,

LORD MAYOR OF LONDON.

MY LORD,

YOUR elevated position as Chief Magistrate of the first commercial city in the world naturally points to your Lordship as the proper person to whom the present brief treatise on FRENCH MERCANTILE LAW should be inscribed. May your Lordship receive this mark of respect, as a grateful recognition, on our part, of your eminent and successful labours and instrumentality in cementing the cordial alliance between our two nations.

We have the honour to remain,

My Lord,

Your Lordship's most obedient servants,

THE AUTHORS.

PREFACE.

At the present moment, when France so cordially invites the co-operation of our manufacturers to contribute to the splendour of the Great Exhibition of the Industry of Nations, fixed for the present month, it has appeared useful to us to enlighten our fellow-citizens on the nature and extent of the rights which foreigners enjoy in France for the protection of their commerce. We are convinced that a sufficient knowledge of these rights can only tend to encourage the commercial transactions which this Great Exhibition is sure to open more than ever between ourselves and our neighbours on the other side the Channel.

We learn every day more and more how pleasing and communicative are the military

habits and manners of our valiant allies. It is surely not less interesting to us to study the habits and customs of their commerce, which, we may fearlessly assert, have the advantage that they are of remarkable simplicity.

Many of our merchants and manufacturers limit their operations with France from a vague apprehension of difficulties which in reality have no existence. We shall esteem ourselves happy if in this brief treatise—which recommends itself more particularly by its conciseness—we succeed in convincing them that the commercial laws of France afford greater protection to the merchant than those of any other country in the world.

It is not our intention here to write an elaborate treatise on commercial law, nor to give a comparative synopsis of the commercial laws of the two countries. Our great object has been more especially to avoid those numerous quotations of law texts, and of the formulæ of acts, which only tend to swell the size of a volume, and interpose difficulties in the way of reference and research.

Moreover, works of science, properly so termed, are but too apt to raise and bring on discussion. We do not claim for this brief treatise the title of a scientific work. We would rather wish it to be considered as a useful book, confining ourselves, as we do, simply to facts and results. The merchant, whose time is too valuable to be spent in reading elaborate technical disquisitions, will find a book of this description most valuable for reference and guidance in all business transactions.

Our great object has been to arrange the principles of law and the customs of commerce which guide the French Tribunals in the consideration and decision of the litigations to which the commercial operations between English and French merchants may give rise. We have more especially dwelt upon the position in which the bankruptcy of a French merchant places his creditors.

We are thus enabled to proceed in the present work by way of affirmative propositions and positive rules, since we are convinced that every one of them will be found fully supported and

borne out by the great legal authorities and jurisconsults of France,—as the interpreters of whom we offer ourselves,—and between whom and the public we shall always be happy to serve as intermediators.

HENRY DAVIES,
14, *Buckingham Street, Strand,*

ÉMILE LAURENT,
24, *Cité Trévise, Paris.*

May, 1855.

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FRENCH MERCANTILE

AND

BANKRUPT LAW.

CHAPTER I.

GENERAL RIGHTS.

ALIENS enjoy before the French Tribunals of Commerce the same rights as French subjects; and the same principles of law which apply to the latter apply equally to the former.

The quality of alien makes no difference in the position of a litigant in France, no matter whether as plaintiff or as defendant.

In *one* respect, however, the French law makes, in the *preliminary proceedings* of a suit, a distinction between a French subject and an alien, both as regards the person and the goods and chattels of the latter.

When a French subject claims a debt, no matter of what amount, of the alien, and produces in support of his claim written evidence, either of a nature held to be conclusive, such as a note of hand or an acknowledgment of debt signed by the debtor, or of a character to raise a strong presumption in favour of the claim, such as a bill or invoice extracted from the claimant's books, the French Tribunal will, upon application, grant a

warrant of apprehension against the person of the alleged alien debtor, unless the latter has an establishment in France. The court will also, under the same circumstances, grant the claimant authority to seize and hold in pledge for his protection, the goods and chattels of his alleged alien debtor.

The alien may in such cases obtain the release of his person or goods, by paying into Court a sum of money equal in amount to the alleged debt. The Court will, under certain circumstances, be satisfied even with a smaller amount being deposited.

But if the alleged alien debtor, on his part, can show to the satisfaction of the Court that the pretended creditor is not sufficiently responsible, and that the proof of the alleged claim is defective, the Court will, in the interest of the alien debtor, call upon the French creditor also to give proper security.

Thus, where a Frenchman from motives of malevolence wrongfully claims a debt of an alien, putting him to grave inconvenience, by arresting his person or seizing his goods, the injured party is safe to obtain a just reparation, inasmuch as the Tribunal will inflict damages in proportion to the injury suffered.

This is so well known in France, that we may safely assert, without fear of any well-founded contradiction, that there are many instances of Frenchmen having had to pay heavy damages in consequence of unjust and vexatious claims preferred against aliens.

The warrants of apprehension or of seizure are granted by the judge (who is the president of the Civil Tribunal, specially appointed for that purpose by the law), in the *absence* of the debtor, but the latter can

always, of right, demand to be *immediately* brought before the judge, and to raise the question of reciprocal security, should he desire it. Consequently, no arrest of the person or seizure of the goods is ever actually consummated without a previous hearing of both parties before the judge.

The authority of the judge is absolute in the above cases. However, if the arrest of the person or the seizure of the goods of the alien debtor has been effected in an irregular manner, and not in conformity with the proper forms and rules of the law, the aggrieved party may the same day, or the day after, move the Civil Tribunal to annul the proceedings, and the decision pronounced by the Tribunal on this motion, may be referred for revision to the Imperial Court of Appeal, which will give judgment in a few days, and again from the decision of the Imperial Court an appeal lies to the Supreme Court of Cassation; but the judgment of this latter Court is not so promptly given.

The provisional arrest of the person of an alien debtor and the seizure of his goods are called conservatory measures.

The independence and integrity of the French judges are proverbial, and there is so wide a distance between the judge and the litigants, that no occult influence can be brought to bear upon the decisions of the former.

Such are, on the one hand, the only exceptional weapons which the laws of France place in the hands of the French creditor against an alien debtor, and on the other hand, the protective dispositions which the same laws have made in the interest of the alien debtor,

who is thereby effectively protected from all wrongful molestations and vexatious claims.

Arrest of the person of a debtor, and provisional seizure of his goods and chattels, may also be resorted to, on the part of an *alien creditor*, against a French subject, but only under certain conditions,—viz :

The personal arrest can only be effected after the alien *has obtained a judgment* which constitutes him creditor of a sum exceeding 200 francs, or £8 English money, and the provisional seizure of goods only if the debtor is a hawker, or perambulating dealer, or if he is about to remove his furniture and goods.

The requisite permission to take the latter measure (seizure of goods and chattels), is obtained, as already stated, by application to the judge.

To sum up, the only difference which exists between the rights of French subjects against aliens and those of the latter against the former, consists in the *provisional arrest* of the debtor granted to the French, and refused to the alien creditor.

We have deemed it advisable in the first place to point out this exceptional difference, that we may without restriction or impediment enter upon the consideration of all the other parts and branches of the law which apply equally and without distinction to French subjects and to aliens.

After these preliminary remarks we will now successively discuss the various forms of transactions which may take place between French and English merchants, and point out the rules which govern them, and the rights which are conferred thereby on all parties.

CHAPTER II.

OF SALES AND PURCHASES.

EVERY individual of full age may trade in France.

The period of full age is fixed at twenty-one years, and the proof of it is established from personal record.

An infant, or minor of eighteen, may also trade with the sanction of his father; or if an orphan, of his guardian or guardians, which sanction requires to be given in certain forms prescribed by law.

The English laws admit the same rules and principles.

The proof of a contract of purchase or sale is established either by written documents, or by the testimony of witnesses.

Those conditions of sale which have not been expressly stipulated in the contract are determined by the general law, and in case the latter should be silent on the point by the usages or customs of trade. Accordingly, to constitute a regular contract of sale, it suffices that the vendor and purchaser have agreed upon

1. The subject matter of the sale,
2. The price to be paid for it.

If, therefore, the thing sold is materially known and identified by the two parties, it suffices to designate it by name; but if, on the contrary, the thing sold does not actually exist in the form of a determinate specific

body, it is necessary to state its nature and quantity, and also, as far as possible, its quality.

If the quality of the article is not expressly described in the bargain, it suffices that it be *fair* and *merchantable*.

The want of proper description of an article having several distinct qualities, does not annul the contract; and we shall see, in the chapter on the Delivery of Goods, what consequences may result from an omission of the kind.

Nor need the price be fixed at the moment of the bargain; it suffices that a certain mode of settling it shall be clearly specified in the contract: thus, a sale or purchase may be validly effected by stipulating that the price to be paid for the thing sold is to be settled either by valuation by competent persons, or by the current quotations of the market.

The books of a merchant or trader are evidence against him, and the adverse party has always the right to appeal to them in proof of the conditions of a sale or purchase.

If, on the contrary, a merchant or trader tenders his own books in support of a statement of his relative to the conditions of a contract of sale, they are not admitted as conclusive evidence, but merely constitute a simple presumption in his favour, which requires to be corroborated by other circumstances.

There are in the principal cities and places of commerce in France sworn brokers, whose business it is to act as agents in the effecting of sales or purchases. Their functions are the same as those of the English brokers.

In cases of dispute between buyers and sellers, the

declaration of a sworn broker, even though supported by the production of his books containing the regular entries of the commercial operations in which he has taken part, is held in law insufficient to establish the existence of a sale or purchase.

The law having imposed on brokers the obligation to write in duplicate the details of every bargain made through their agency, and to get it signed by both parties, nothing can supply in the way of evidence the absence of this written contract.

The simple testimony of a broker is therefore, in some measure, of less weight than the evidence of a third party upon whom the law has imposed no special obligation.

The guiding principle of these rules is based on the necessity that both the contracting parties should be fully and clearly resolved upon the terms of the contract and the completion of the bargain.

The observations made in the preceding passages of this chapter, apply equally, and without distinction, to merchandise, goods and chattels, and real estate, with this single exception, that the proof of the sale of real estate cannot be established by witnesses if the value exceeds 150 francs.

However, the acquisition of real estate is attended with a series of formalities essential to the free possession of the property acquired, and as transactions of this nature are out of the usual line of commercial operations, we shall not discuss the subject here, but confine our remarks entirely to goods and merchandise.

Unquestionably, commercial speculations may often also embrace sales and purchases of land, but on this

subject we think it the wiser course to refer our readers to the works treating more especially of the acquisition and administration of real estate.

There is one kind of property of an exceptional character as regards its sale or purchase—viz., *ships*, or *sea-going vessels*, which must not be confounded with boats or barges employed in inland navigation. The distinction to be made between these two different classes of vessels does not depend entirely upon the line on which they respectively navigate, for both are found frequently in the same waters, more particularly since a regular packet service has been established between London and Paris.

The mere fact of a vessel navigating more or less habitually the open sea, is of itself sufficient to constitute her a sea-going vessel. All vessels of the kind must, at the time of their launch, be entered on the registers of the French Navy, and especially attached to some seaport. Upon such registration of a vessel a certificate of *Francisation* is granted. A vessel of the kind can only be commanded by a Frenchman, and every individual of the crew must be entered on the Navy list: foreign sailors are admitted only under certain fixed regulations.

Boats or barges may be properly defined as vessels to which the navigation of the high seas is interdicted. These conveyances are, indeed, also subjected to certain regulations in the interest of the public safety and the proper administration of lakes, canals, and rivers; but as far as the sale and purchase of them is concerned, they are not treated in any way different from ordinary moveables.

Whereas *ships*, or *sea-going vessels* are held to be chattels of an exceptional character which can be owned by Frenchmen alone, and transferred only with certain peculiar formalities. Any instrument or deed, fraudulently executed, to elude this absolute prohibition, is held to be null and void, and involves the parties to it in unpleasant responsibilities.

There is a peculiarity, which we must here mention, relative to the sale and purchase of stock in the public funds quoted at the French Stock Exchange.

Transactions in the Funds can only be made through the medium of a stock-broker specially appointed for that purpose, and in accordance with certain rules prescribed by the Government.

A person may, however, undertake to sell or purchase a certain amount of stock in the public funds, to be delivered at a certain fixed period; and an engagement of this kind, made in the usual form of contracts of sale and purchase, will be held valid, but simply in so far as to expose the vendor to an action for damages at the suit of the vendee; but the engagement does not confer upon the latter a title of purchase *leading to the possession of the promised object.*

We have to make here a general observation concerning a certain class of contracts of sale and purchase, both as regards goods, or merchandise, and stock in the public funds, which are called "time-bargains."

Operations of this nature are validly contracted in the same mode as fixed bargains, but on condition always that it is the intention of the contracting parties to consummate them by the *actual delivery and acceptance* of the objects sold and bought.

Speculation bargains, on the contrary, which are simply intended to lead to the payment of the difference between the price stipulated in the bargain and the actual price or value of the article on the day fixed for its pretended delivery, are formally prohibited, as constituting a gambling or wagering transaction, which cannot be set up as a cause of action in a French Court of Law. However, voluntary payments for the compounding of differences are always permitted and held valid.

A serious difficulty arises when the Tribunals are called upon to decide whether a time-bargain submitted to their consideration belongs to the class of *bonâ fide* contracts, which are valid in law, or to the category of gambling or wagering transactions, which are legally null and void.

The following are the invariable rules which guide the French Courts in the decision of this question:—

If it can be clearly established that the one of the contracting parties who pleads the nullity of the time-bargain, was, *at the time the latter was made,* from the nature of his business, his connexion, and his standing in point of fortune, in a position (if the vendor) to furnish the article sold, or (if the purchaser) to accept it, the bargain is held to be a *bonâ fide* transaction, and the protesting party is adjudged to carry it into effect. So the good faith which ought to govern all commercial transactions requires. In the contrary case, the contract is pronounced to be null and void, because the one of the contracting parties is held to have known the precarious position of the other, and cannot pretend that he really intended the bargain as a serious and *bonâ fide* transaction.

The nullity of a bargain is pronounced also if it appears on the face of it that the thing sold or bought cannot possibly be furnished, as would be the case, for instance, with the sale of a quantity of a peculiar kind of merchandise exceeding that which the contracting parties knew to exist in the market.

It has often happened that on the day appointed for the performance of a bargain, the one of the contracting parties, called upon to carry his part of it into effect, has alleged, and even shown, that the other party had deceived him at the time the bargain was made as to his true position, so that the party claiming the performance of the contract is only enabled to fulfil his part by reason of the benefit to be reaped from it; whilst, had the event turned out otherwise, so that he would have been a loser instead of a gainer by the transaction, he would have been unable to carry his part into effect. Now although this situation of affairs may appear contrary to equity, as the chances for the two parties are not equal, it is only with the greatest circumspection that the Tribunals admit this plea to prevail, as it is deemed necessary, as much as possible, to maintain and enforce the performance of all commercial transactions that may be entered into, and as it would be a most inconvenient and dangerous practice to permit inquiries into the position of merchants and traders.

But the case is very different if an imputation of the kind is made *between the day of the bargain and the time appointed for its performance.* In that case the Tribunal does not hesitate to compel the party whose solvency is questioned to give security, so as to guarantee the performance of *his* part of the bargain.

In case one of the parties to a bargain should become a bankrupt before the expiration of the time fixed for the completion of the contract, the Tribunal will compel the Syndic to give security, if that officer, when called upon to declare his intentions, intimates, on behalf of the body of creditors, that the completion of the contract is insisted on.

There are sales which become perfect and complete only after the fulfilment of certain conditions, such as, for instance, the completion, to the purchaser's satisfaction, of the article ordered of the vendor, or a preliminary trial by the purchaser.

As a matter of course, the purchaser is fully entitled to rescind the sale, if the completion of the work fails to satisfy his reasonable expectations, or if, in the second case, he does not approve the article upon trial.

A purchaser who has reason to complain of badly made articles might sue for damages, if it were shown that the vendor has, in his workmanship, been guilty of neglect or of fraud.

We have to speak here also of aleatory, or contingent, sales, *i. e.*, such the completion of which depends upon the passing of some uncertain event or events.

Contracts of this nature, which are of frequent occurrence in the higher walks of commerce, and more particularly in sea-port towns, should always be construed and performed with scrupulous precision; for this reason they are invariably made in writing.

Particular attention must be paid, in these documents, to clearly define the nature and extent of the eventualities upon which the bargain is made to depend. For example, in a case of sale of goods on board a ship

on its passage, all the circumstances that may bear upon the case, such as the name of the vessel, the port of destination, the expected time of arrival, &c. &c., must be carefully set forth.

If the vendor intends simply to cede an *expectation*, he must state this very clearly. A merchant who sells goods on board a certain vessel upon a simple intimation on the part of his correspondent that the loading *will be effected*, exposes himself to the risk of having to pay damages, if in the contract he speaks of the loadings as *an accomplished fact*, and it should actually not take place.

The proper line of conduct to be pursued in operations of this kind may be briefly laid down as follows:

To be careful, in drawing up the contract, not to omit mentioning any circumstance of a nature to inform the contracting parties as to the real situation of the articles sold; and after the bargain is made, to do nothing, directly or indirectly, to influence in any way whatever the eventualities contemplated by the contracting parties.

It is impossible to foresee and specifically provide in the clauses of a contract against all the numerous events and casualties that may arise, more especially in the sea trade; but the intention of the contracting parties should be so clearly expressed in the instrument of sale and purchase as to embrace in a general way every possible contingency.

We shall devote a separate chapter to the Rights and Duties of Factors, or Commission Agents, through the medium of whom sales and purchases of goods are frequently made. But here is the proper place to offer a

few remarks on the intervention of commercial travellers and representatives of commercial houses.

Commercial travellers are persons sent by the principals or chiefs of houses with instructions to offer for sale, or to buy, goods in the different places of commerce.

Representatives of mercantile houses are persons stationed in places more or less distant from the principal house, and acting as deputies or delegates for the same.

These two classes of commercial agents stand respectively in a different relation towards their principals; but in their dealings and operations of sale and purchase with third parties their respective position is identically the same.

Commercial travellers are *mandatories* or *deputies* in the true acceptation of the word, and their acts can only be binding on their principals within the limits of the mandate or authority entrusted to them. Any act of theirs exceeding these limits is invalid. Great care must therefore be taken, before accepting their agency and interposition, to ascertain the exact extent and limits of the authority entrusted to them.

There is no special form prescribed by which authority to buy or sell in the name of the firm is conferred upon commercial travellers. The authority to do so is claimed in some cases upon the strength of letters addressed by the principal to the traveller, or upon the faith of simple notes; occasionally there may be a formally executed document. In transactions with commercial travellers, parties must therefore always be more or less strict and careful with regard

to the nature and extent of the authority possessed by these agents, according to the greater or less importance of the transaction.

In the general usages and customs of commerce, the exhibition of samples and of the private mark or card of the firm is of itself sufficient to show the authority of the traveller to do business within the limits of the ordinary transactions of commerce, and on the usual conditions.

But all affairs exceptional from their importance or from the nature of the conditions, require on the part of the traveller the production of some especial authority or power given to him by his principal.

In bargains made with commercial travellers, difficulties will often arise, chiefly from differences of opinion regarding the mode of performance and the interpretation to be put upon the conditions as intended by the traveller, and as understood by the other party. Merchants will often neglect to demand from travellers *a written memorandum* of the terms and conditions of the transaction between them; and it is by no means rare to find that the account of a transaction transmitted by the traveller to his principal, differs essentially from the memorandum of the party with whom the bargain has been made.

In cases of dispute the Tribunals decide against the principal whose traveller has neglected to insist on a written memorandum, on the ground that no one can claim the performance of a contract upon a mere *ex parte* statement; and indeed it is very desirable that all contracts of sale and purchase should be made by written agreements in duplicate.

It sometimes happens that a customer, after having concluded a bargain with the traveller, entertains doubts respecting the extent of the authority possessed by the party with whom he has made the bargain, and that he addresses himself accordingly to the head of the firm, in order to obtain from the latter the ratification of the contract. This is a very proper way of guarding against any future misunderstanding, and if a demand of the kind elicit no reply from the principal of the house to which it is addressed, the trader who has made it is justified in construing the silence on the part of the former into a refusal to be bound by the act of his agent.

There is a distinction to be made also between commercial travellers authorized to make *actual sales*, and travellers who simply call to collect *orders* of *commission of purchase*. Thus, for instance, the principal manufacturing towns of France, such as Lyons, Lille, Rouen, do not generally deal *directly* with the trade, but usually deal with commission agents, who send their travellers to distant places to solicit orders. It will be readily understood that transactions entered into with agents of this class have not the same character as bargains made with an ordinary commercial traveller. Indeed, a properly authorized traveller who has actually *sold* certain merchandise in the name and on behalf of his principal, has made a *definitive* contract, which the customer is not at liberty to repudiate; buyer and seller being alike definitively bound by it; whereas, on the contrary, as the traveller of a commission agent, who *solicits orders* for his principal, simply takes and receives a commission or mandate to buy, the party

giving that commission is always at liberty to retract it, as long as the order has not yet received a commencement of execution. In one word, no one is held definitively bound by a mere order of purchase, as it is an acknowledged principle that the mandate may always be retracted so long as it remains unexecuted.

It must be stated here that, for the same reason, the head of a house of commission is not rigorously bound by the reception of the order which his traveller may collect, and that he may always plead impossibility of execution, as we shall explain more in detail in the chapter on Commission Agents.

It is necessary also to remark briefly on the sale and transfer of debts.

The difficulties which creditors sometimes apprehend in the realization of their claims, induces them frequently to cede or sell them to third parties.

The sale of a debt can be validly effected only through the medium of a contract signed by the parties, and enrolled at a duty of one per cent.; or by a deed authenticated before a notary public.

These sales, which are called assignments of debts, take effect against third parties only after due notice of the transfer has been given to the debtor. No other mode of cession is admitted, and the notice to the debtor alone puts the purchaser in lawful possession of the claim ceded.

Once in legal possession of the claim, the purchaser succeeds to all the rights of the original creditor. However, there are certain personal rights or privileges which do not always go along with the claim, or which rise after the cession. Thus, for instance, where an

English creditor sells a claim upon a Frenchman to another Frenchman, the position of the vendee is identically the same as that of the vendor. But if the debtor were a foreigner residing in France, the purchaser of the debt would acquire by the cession the exercise of the personal right which every Frenchman possesses to demand the arrest of the debtor before judgment, and on the other hand a Frenchman having a claim upon a foreigner residing in France, were he to cede the same to another foreigner, the latter would *not* acquire by that cession the right of having the debtor arrested before judgment.

There is an exception made also as regards a certain class of debts—viz., disputed debts. The purchaser of a disputed claim, that is, a claim which is the object of a lawsuit, is bound to accept payment by the debtor of the exact sum which he has paid for the cession of the debt, together with interest and the cost of the deed of cession, in full of all demands. The payment of this sum releases the debtor definitively from all obligation, no matter how large the original debt may have been.

This mode of release is open also to coheirs against the purchaser of rights of succession which are still undecided.

These two exceptions have been created in a spirit of morality, to check speculators who might feel inclined to turn to their personal advantage the difficulties inseparably connected with a lawsuit, or the division of an estate between coheirs.

There are certain articles of which the sale and purchase is rarely completed at once, as the purchaser may

wish to consult some third party not present at the time, or to reserve to himself the right of inspecting and examining the article once more before he definitively concludes the bargain. Objects of the kind are, for instance, costly stuffs, gems and precious stones, objects of art, &c. &c.

As the holder of such articles may lose the opportunity of selling them during the delay asked by the intending purchaser, it is usual to stipulate the deposit of a certain sum of money by the purchaser, which is called *earnest*.

In transactions of this kind when earnest has been given, both parties are equally at liberty to withdraw from the bargain, but only on the following conditions: the party having given earnest to forfeit the same; the party having received earnest to repay double the amount deposited.

The preceding explanations apply more particularly to the *form* of bargain and to the subject matters of sales and purchases. We will now proceed to specify the intrinsic conditions essential to establish the validity of a contract.

As good faith ought to be the fundamental basis of every convention or agreement, there can be no legally valid bargain (no matter in what form it may be drawn up), except with the *free consent* of the contracting parties.

The consent of a party to a bargain is not free if it has been given in error, or obtained by surprise or fraud, or if it has been extracted by violence.

The Tribunals are omnipotent to decide as to the existence of errors or fraudulent devices.

Still the plea of error can be admitted only under certain circumstances—viz.:

1. When the error has been *common to both* parties.

2. When the error committed by one of the parties is *so self-evident* that the other party *must* have perceived it, but has chosen to leave it unnoticed, with a view of turning it to his own advantage.

We will illustrate these principles by a few examples, which may serve to render them more clearly intelligible to the reader.

Examples of Error.

A sells B 5000 bags of coffee, which he declares in the instrument of sale to have arrived the day previous in port on board the ship Adèle. This vessel, which both parties have visited, contains only 500 bags of coffee, and, from her tonnage, cannot possibly contain a larger quantity. It is evident, therefore, that there is in this transaction a manifest error common to both parties, who have set down in the contract of sale 5000 instead of 500.

In this case the Tribunal will, on the motion of either of the contracting parties, unhesitatingly reduce the number of bags to 500.

The same decision will be given if it can be proved that one of the contracting parties had perceived the error, without calling the attention of the other party to the fact.

But if the ship Adèle was on the high seas at the time the bargain was made, and A had sold to B by mistake 5000 bags of coffee, B not knowing the tonnage of the vessel, and really intending to purchase 5000

bags, the bargain will be held valid to the full extent of the 5000 bags, and the vendor must complete that number or pay damages to the purchaser.

It is clearly apparent in this latter case that the error which A has committed is altogether personal, and the consequence of this error cannot rightly fall upon the purchaser, B, who really intended to buy 5000 bags, and calculated upon receiving them.

As an example of fraudulent practices let us take the following:

Three ships laden with coffee are consigned by A, of Havannah, to his factor or correspondent, B, at Havre. A writes at the same time to B to inform him that the coffee harvest has been bad, and that he can only forward one cargo. B, believing this statement to be true, consents to purchase at a high price the only cargo so announced. On the arrival of the three vessels, B protests against the bargain, on the ground that he could have bought the coffee at a lower rate had he known the actual abundance of the article.

It is evident that A has deceived B, and that he has had recourse to fraudulent representations for the purpose of selling his coffee to greater advantage. The Tribunals would not hesitate, on the motion of B, to annul the bargain.

Or it may be that the purchaser, B, writes to A, that ten vessels laden with coffee have in the last week arrived at Havre, and that the price of coffee has fallen in consequence. This information induces A, who had till this hesitated to part with his coffee at the low price offered for the same by B, to accept the offer made. But some time after he learns that B has deceived him

as to the arrivals of the ships laden with coffee. If he complains of the fraud thus practised upon him, and refuses to deliver the coffee sold by him to B, the Tribunals will pronounce in his favour.

But if, on the contrary, A has in the first place *applied* to B to ask the latter for information respecting the state of the arrivals in the port, and the chances of a rise or fall in the price of the article, the misrepresentations of B in answer to A's questions will not of themselves suffice to justify the repudiation on the part of A of a bargain which may have been entered into in consequence of the correspondence. Unquestionably, in a moral point of view, B's conduct in not strictly adhering to truth in his reply to the questions asked by A must be held to be indefensible, but he cannot legally be charged with fraudulent practices.

To express it briefly, a fraudulent character is imparted to a misrepresentation by the fact of the party who makes it *volunteering* the false information, with the intention of deceiving the party to whom it is made; but if the latter, by any act of his own, has invited the deception, the laws of France hold, that any transaction arising in consequence is not necessarily tainted with fraud.

These remarks, and the illustrations of the principles which we have adduced, will, we trust, prove a sufficiently safe guide to the British merchant in transactions of this nature.

There are, in the operations of commerce, an infinite number and variety of shades of error and deceit, which may be safely left to be dealt with as they deserve by the good sense and discrimination of the community.

CHAPTER III.

TRANSFER AND DELIVERY OF THE ARTICLE SOLD.

THE conditions of sale of any commodity generally embrace also those of the delivery, and the particular circumstances which either of the parties may wish to provide for. In cases where the contract is silent on the conditions of the delivery, &c., the following are the general rules of the law:—

The delivery is to be made by the vendor at the place where the subject matter of the sale was lying at the time the bargain was completed. If the thing sold was at that time in the warehouse of the vendor, the delivery must be made at the door of that warehouse.

The expenses incurred for keeping and managing the thing sold, up to the time when the purchaser takes possession, fall on the vendor.

Certain kinds of goods are subject to special rules of delivery, which depend upon the general or local usages of commerce.

A cargo of goods sold on board a vessel must be delivered at the egress of the dock. Goods sold in port, with conditions of weighing, must be delivered in the scales. If they are sold in bond, before the payment of the duty, the delivery is effected by the simple identification of the goods, and the declaration of the transfer of ownership in the register.

A crop of grain, &c., must be conveyed by the vendor to the side of the public road.

When the vendor undertakes to convey the goods sold on board a ship, he is only bound to deliver them in front or over against the vessel, taking a receipt for the same from the captain, who alone is entrusted with the duty of loading. If the merchandise is of such bulk and weight that its conveyance on board requires the aid of certain apparatus or engines specially adapted for that purpose, and erected in some part of the port, the delivery is effected on the spot where such loading engine or apparatus stands.

If the merchandise is of a nature to require to be put in a sack or wrapper, or in a cask, the vendor has to furnish the same, and the value is included in the price.

It often happens in the case of liquids sold for consumption, such as wine, oil, liquors, &c., and also of grain, flour, and other provisions, that the vendor reserves to himself the property of the cask or sack used; in cases of this kind the purchaser may keep these objects for a reasonable time, to enable him to transfer the contents to vessels of his own.

The merchandise must be delivered in good outward condition as regards the cover or wrapper.

We have already stated, in our previous chapter on Sales and Purchases (page 6), that in cases where the quality of the wares or merchandise sold is not specified in the contract of sale, it suffices that the article be *fair and merchantable*, that is to say, that it be sound, without any deterioration, and in a good state of preservation; in fact, such as it is usual to bring into the market.

If there are different sorts or qualities of the article

sold, and no specific mention is made in the contract of the exact sort or quality of the article intended to be bought or sold, the vendor is not obliged to furnish the first quality, but he is not permitted, on the other hand, to furnish the worst.

If there is a considerable difference in the respective values of the several sorts or qualities of the same denomination of article, the price agreed upon in the contract may be appealed to as to the exact quality which the contracting parties intended, the one to sell, the other to buy.

When the sale of an article which may be prepared in different ways, or of different sorts or descriptions, is made to a person who commonly uses only a certain description of it, it is held that the vendor has impliedly undertaken to furnish the exact description of the article which will suit the wants of the purchaser.

In sales of wines and spirits, the strength, or degree, and the taste, are usually mentioned in the contract. In cases of omission, the general usages of commerce are followed; these usages are ordinarily deposed to by brokers.

The goods should be identified and approved at the moment of the delivery; but it often happens that the identification can take place only long after the delivery.

The term *livraison* must not be confounded with *délivrance*; the English translation of both is indeed *delivery*, but the latter alone corresponds to the English term, including as it does the *actual receipt and acceptance* by the purchaser. The term *livraison* signifies only a *partial* delivery, which takes place at the moment when the goods sold pass from the responsibility or

control of the vendor to that of the purchaser, whereas the *actual* delivery takes place at the moment when the purchaser takes actual possession of the goods, or when he *accepts* them, though still leaving them in the possession of the vendor.

Example.

A, of London, sells to B, at Havre, 50 casks of oil, to be delivered on board the ship London, which plies between the two ports; A consigns the casks to the custody of the captain of this vessel; this is a *partial* delivery (*livraison*), in this sense, that the property in the oil is henceforth vested in the purchaser, B, and that any accident happening to it is at his risk. But it does not amount to an *actual* and *complete* delivery, *i. e.*, an acceptance and *taking possession* of the goods on the part of the purchaser, B, inasmuch as he still retains the right to refuse the goods, if, upon their arrival, he finds them defective or of an inferior quality.

But if A declines to take upon himself the responsibility of forwarding the goods, and insists upon B appearing, either by himself or by some properly accredited agent, to receive the oil on board the ship in the Port of London, there will, in that case, be an *actual* and *complete* delivery of the oil in London, and the purchaser, B, has no longer the right to object to the reception of the article on the ground of inferior quality, or on any other ground whatsoever.

To insure, on the one hand, the responsibility of the vendor to answer for the quality of the article up to the time of the actual delivery (*délivrance*), and, on the other hand, to protect him from the risks and accidents

of the road, from the time of the delivery of the goods to the carrier (*livraison*)—it is indispensable that any damage or injury that may have taken place in the transit should be immediately pointed out and verified on the arrival of the goods, so that the origin of such damage or injury may be ascertained, and the liability fixed upon the proper party.

In the chapter on the Transport and Conveyance of Goods, we shall specify the formalities to be observed, and the delays accorded for the same, and also mention the cases in which carriers may be held responsible for any damage suffered by the goods entrusted to them for conveyance.

Here we have to consider only those cases where the responsibility rests exclusively with the vendor.

If, on the receipt of the goods, the purchaser alleges that they are of a different description from those ordered by him, he must *immediately*, and before the removal of the goods, take care to have the defects, or difference, of which he complains, properly verified.

This obligation is incumbent upon the purchaser more particularly in the case of goods of a nature to suffer further deterioration during the time that any litigation, arising from the refusal to accept them, may last.

Thus, for instance, where corn, fruit, potatoes, &c., arrive, affected with disease, or in a damaged condition from inherent causes, the *existence of the disease* and the *extent of the damage or injury* must be *immediately* verified.

To this end the purchaser makes application to the President of the Tribunal of Commerce, or, if there is

no such Tribunal in the place, to a justice of the peace of the district, requesting the appointment of one, two, or three competent persons to examine the goods. The judge decrees by ordinance, and the examiners appointed by him being duly sworn, proceed to examine the goods; they then draw up verbal process of their proceedings and the results arrived at.

The President of the Tribunal of Commerce of Paris usually adopts a very wise measure to insure to these inspections the care and impartiality which the interest of the absent consigner of the impeached goods demands. He appoints, in his decree nominating the examiners, a merchant or trader, whose special duty it is to represent the absent party *ex officio*, and accordingly to take care that the examiners be properly informed and put in possession, more especially through the medium of the correspondence on the subject, of all the circumstances likely to assist and guide them in the performance of their duty.

If goods consigned from France to some other country arrive at the place of destination in a damaged state, and the consignee wishes to have the deterioration verified by an official inspection, he must apply to the French consul to nominate the examiners, as it is only upon the report of persons thus acting under the legal sanction of that official that the French Tribunals will act.

If, upon inspection, the damage appears to extend only to a small proportion of the goods, say five or ten per cent., this does not lead to the cancelling or annulling of the bargain, but simply to a proportional abatement or deduction in the price agreed upon.

But if the damage affects a considerable portion of the goods, this is held a sufficient reason for rescinding the bargain. Here again the usages of commerce must be consulted to determine the exact limit where the purchaser may rightly refuse to be satisfied with a deduction or abatement in the price proportional to the deterioration of the article, and may insist upon the absolute resiliation of the bargain.

It is always optional with the purchaser to exercise his right of repudiation or no. It may be a matter of importance to him not to let his mill or workshop stand still for want of material, or to leave his warehouse without the necessary stock. This consideration may induce him to prefer an abatement in price to an absolute repudiation of the bargain; only he must signify his intention with the briefest possible delay, that is, immediately after the report of the examiners.

The reliance which the Tribunals who are afterwards called upon to decide the case, place in the reports of the examiners is not, however, absolute, inasmuch as the purchaser, and even the official examiners, will often neglect making due mention of, and inquiry into, all the facts of a nature to justify the objection. It is, therefore, always advisable for the consignee to keep, under such circumstances, a sample of the damaged goods, under the seal of the official examiner or examiners, should the requirements of his business not permit him to keep the entire stock.

Whenever the circumstances are such that the purchaser elects to repudiate the bargain, he makes application to the President of the Tribunal of the place, or, as the case may be, to the justice of the peace

of the district, requesting permission to deposit the repudiated goods either in a public warehouse, or such private one as the judge may designate. The costs incurred in this proceeding, the charges for conveying the goods to the place of deposit, and the warehouse rent, &c., fall upon the party who ultimately loses the suit.

A vendor who neglects to deliver goods to a purchaser by the time agreed upon in the bargain, is liable to be sued for damages, if the delay has been prejudicial to the purchaser; but it is necessary to give the vendor notice of the expiration of the term for delivery; this notice may be validly given by letter, and indeed even that is not necessary in cases where, from the nature of the merchandise, it ought necessarily to be delivered by a certain fixed day, after which the purchaser will not be able to make use of it. This is the case, for instance, with goods purchased with an intimation that they are required for a *fair*, or are to be shipped on board a vessel which is to sail on a *certain fixed day*.

As a matter of course, a vendor who fails *altogether* to deliver the goods sold by him, is liable to be sued for damages; and the Tribunals generally inflict a heavy amount, if it is proved that the vendor refused to deliver from motives of dishonesty.

In cases where the goods sold, and of which delivery is dishonestly refused, are deposited in a public warehouse, or with a third party, the purchaser may even demand and obtain authorization to seize them.

If the delivery is retarded or rendered impossible by some inevitable contingency, altogether independent of the will and power of the vendor, such as war, insur-

rection, inundation, &c., the vendor is not liable to an action for damages.

There are some other accidental events of a less general nature, which may or may not be held to constitute a sufficient excuse for the non-delivery of goods sold.

For example, the vendor of some specific object which cannot well be replaced, such as an autograph, an object of art, &c., would be released from his liability to deliver the said object, if it happened to perish by fire, shipwreck, or some other accident.

But the case is different where goods that may be replaced, such as coffee, flour, &c., are accidentally destroyed before delivery. The vendor is in such cases bound to deliver to the purchaser the same quantity of the like goods, no matter the price at which he may have to procure them.

If the vendor has stipulated for cash payment, he is not bound to deliver if the amount is not tendered.

Nor will he be bound to deliver goods sold upon credit in a case where the purchaser has died, or is notoriously a bankrupt, unless his heirs or representatives in the case of death, or the Syndic, in case of bankruptcy, should offer special bail to guarantee payment when due.

We shall see in the chapter on Bankruptcy, that the vendor may, in the event of the purchaser becoming bankrupt, retake his goods, even after legal delivery of the same, provided the purchaser has not taken *actual* possession of them, either by himself or by his agent.

CHAPTER IV.

WARRANTY BY THE VENDOR.

UPON the principle of *caveat emptor*, the vendor is not responsible for any *patent defects* in the thing sold, which the purchaser might have readily detected upon inspection; but he warrants the vendee against all *latent defects* in the subject matter of the sale.

The term *latent* is applied to any hidden faults or deficiencies in the thing sold which renders it unfit for the purpose for which it is designed, or diminishes its value to such an extent that the purchaser would not have bought it had he been aware of the fact.

The vendor is not allowed to plead his own ignorance of the existence of such defect or defects in answer to an action for breach of warranty; but he may free himself from responsibility, by stating at the time of the bargain that he declines to warrant the subject matter of the sale.

The consequences of a breach of warranty are, either the total abrogation of the contract, or the obligatory supply of an article fairly answering the description of the one bargained for; the purchaser may also elect to keep the defective article upon receiving a proportionate abatement in the price. It is left to the discretion of the judge to determine which of these different courses is to be taken.

There are cases in which the Tribunals will, in addition to either of the consequences just stated, con-

demn the vendor to pay more or less heavy damages. This is done by the judges in cases where the latent defect has been occasioned by negligence or culpable speculation on the part of the vendor, and where a material injury has thereby been inflicted on the purchaser, as, for example, in the case of badly manufactured tools, or of engines constructed of unsound materials, which by their breakage or explosion may injure the workmen, or put a temporary stop to the work.

There is no warranty whatsoever on the part of the vendor, in cases of forced sales made by *public auction*, in obedience to the decree of a court of justice; for this reason, that the sale is not a voluntary sale, and that the creditor, in divesting his debtor of the property in the thing seized and sold, cannot assume to himself any responsibility whatsoever towards the purchasers of the goods.

This total absence of all warranty against defects of whatsoever nature exercises a considerable influence upon the prices realized at public sales.

A special act passed on the 20th May, 1838, defines the nature of *redhibitory* defects, *i. e.*, defects entitling the purchaser to repudiate the bargain in the sale of animals. We deem it advisable to enumerate here the redhibitory defects in *horses*.

These are: periodical defluxions from the eyes; epilepsy, or falling sickness; glanders; farcy; diseases of the chest of long standing; foundering in the feet of long standing; immobility or stiffness; pursiness; chronic wheezing; tick, without wearing out the teeth; intermittent inguinal hernia, or rupture of the groin; intermittent lameness caused by old disease.

According to the before-mentioned act, the demand of redhibition or dissolution of the sale by the purchaser, on the ground of breach of warranty, must be lodged with the court within nine days after such sale.

Except in the special case just mentioned of the sale of horses, the purchaser is not restricted in his right to sue for breach of warranty, to a certain fixed term after the completion of the bargain. Still the spirit of the law demands that an action of the kind should be brought as speedily as possible after the discovery of the latent defect or defects, inasmuch as a long-continued silence on the part of the purchaser is regarded by the Tribunals as a kind of renunciation of his claims to redress.

In the matter of the construction of buildings, the architect and the contractor of the works are open to an action for damages on the part of the proprietor, on the ground of defects of construction, or of the use of unsound materials; and this liability continues for ten years.

The question has often been discussed before the French Tribunals, whether the same delay to sue for breach of implied warranty, which is granted against architects and contractors, is accorded also against the constructors and suppliers of steam-engines, hydraulic-engines, and other stationary mechanical constructions. Several decisions have been pronounced in the affirmative, and the vendors of engines take therefore now usually the precaution of limiting their warranty by express stipulations in a written contract.

CHAPTER V.

CARRIAGE BY LAND AND BY WATER.

Goods carried by land or water travel at the risk and peril of the party in whom the property is vested.

The carriage of goods is effected by several kinds of locomotion.

The identity of the goods carried, and the stipulation as to time, delays, and charges, are set forth in written instruments called, in the case of inland conveyance, *lettres de voiture* (*way-bills, or carriers' invoices,*) and in that of conveyance by sea, *connaissements* (*bills of lading*).

Lettres de voiture, or *way-bills,* are made out in duplicate, one copy for the consignor of the goods, the other for the carrier; *connaissements,* or *bills of lading,* in three copies, of which one is given to the master of the vessel, another forwarded to the person to whom the goods are to be delivered at the place of destination, and the third retained by the consignor for his own security. In many cases a fourth copy is also taken by way of precaution in the event of the others being lost. The fiscal laws of France require these instruments to be written on stamped paper, under penalty of a fine.

The law says, bills of lading may be made out *to order.* The shipper or consignor of the goods specified in a bill of lading may consequently transfer his right of property in the same by way of indorsement. The indorsement must show the name of the party to whom

the right in the goods is transferred, the value given, and the date of the transaction.

A bill of lading may also be made out to bearer, in which case the goods are to be delivered to the party presenting the said bill of lading.

The party who undertakes to carry goods is responsible to the consignor, or to the consignee of the same, for all injuries sustained by the goods whilst under his care, excepting only such as result from *force majeure* (the act of God, inevitable accidents), or from defects inherent in the damaged article. He is responsible also for the damage sustained by the owner of the merchandise by reason of any delay in the transport of the same to its place of destination, except when such delay is caused by some inevitable accident.

The plea of *force majeure* on the part of a carrier, must be supported by such evidence as the time, the place, and the circumstances may enable him to collect and adduce.

In cases where goods have sustained damage or injury whilst in the possession of the party who has undertaken to convey them to the place of their destination, the owner or consignee must, immediately on the receipt of the goods, and before he pays the freight for the same, state his claim for compensation to the competent authorities (the President of the Tribunal of Commerce of the place, or the justice of the peace of the district,) and request them to name appraisers to inspect and estimate the damage suffered by the merchandise, in the same manner as we have explained in the chapter on Delivery of Goods.

The liability to make good any loss or damage which

may happen to any goods or merchandise journeying to the place of their destination falls equally upon the agent or commissioner who has undertaken to provide for their safe conveyance, and upon the carrier who actually effects the transport. Both are jointly and severally responsible to the owner.

The same joint responsibility extends also to every one of the carriers whom they may substitute in their place. However, the latter are held responsible only for their own acts, and no liability attaches to them, therefore, if they can prove that the injuries complained of already existed at the time when the goods were placed in their possession and care.

There are cases where the liability to make good any loss of, or injury to the goods carried, may even reach the expeditor or consignor of the same—viz., when the latter has promised the owner to provide for their safe and secure conveyance to the place of their destination, and has selected for the work of carrying insolvent and untrustworthy agents.

It results from the preceding observations, that the receipt of the damaged goods, and the payment of the freight, *without protest or reclamation,* involves the forfeiture of all claims for compensation.

The agent commissioned by the owner to receive the goods at a certain place, for the purpose of forwarding them to another place, must therefore, if the goods so consigned to him have suffered damage or injury by the way, take the proper steps for the interest of the owner to make the carrier answerable for such damage, since, by neglecting to do so, he will himself incur the liability to make good the damage suffered.

As to the *time* within which an action may be brought against a carrier for loss of or injury to goods, the French law fixes the limits as follows (except as regards carriage by sea):

In the case of goods dispatched to any place within the frontiers of France, six months—in that of goods sent beyond the frontiers of France, one year; both terms to date, in case of the absolute loss of the goods, from the day on which they ought to have been delivered, in the case of damage, from the day on which they were delivered.

The carriage by sea is regulated by special laws; the restricted limits of the present work will not allow us, however, to enter more fully into this subject, and we confine ourselves, therefore, here to remark, that all sea-risks, that is, all casualties beyond the control of the master or commander of the vessel fall upon the cargo, which is responsible even to contribute proportionally to the loss incurred by the jettison, or throwing overboard of anchors, masts, yards, sails, &c., to prevent shipwreck, and to the expences incurred by putting into port for general safety. Certain formalities are imposed upon the master or captain of the vessel in proving these casualties.

Claim for compensation for damage or injury to the goods must be addressed to the captain within twenty-four hours after the landing of the goods, and the action must be brought within one month after, as after that term the Court may refuse to entertain it.

Lastly, no action is admissible after the lapse of one year from the time of the vessel's arriving at the port of her destination.

CHAPTER VI.

ON PAYMENT.

THE instrument which constitutes the title or proof of the claim, indicates usually also the day, place, and manner of payment.

In the case of an oral agreement, or where the written contract is silent on the point, payment ought to be made by the debtor, at his domicile, in specie, at whatsoever time the creditor presents his bill or account.

There are, however, many circumstances in which a special mode of payment has been determined either by the law or by usage.

For example, in the case of the purchase of provisions or articles which the buyer is in the habit of purchasing at the shop of the dealer, and taking home with him, payment is made in cash at the dealer's residence when the goods are taken away.

In the case of goods which the vendor is in the habit of offering at the purchaser's residence, payment takes place at the time when the goods are handed over to the purchaser.

When a sale is effected on the Exchange, or at a meeting of dealers and buyers, or through the medium of letters, the payment should be made at the time and place when and where the thing sold is delivered.

Usage has sanctioned to some extent payment in notes of the Bank of France; however, though *that money* is now universally admitted and received in com-

mercial transactions in France, a creditor cannot be *compelled* to accept it, as metallic currency alone is a legal tender in France.

The debtor is not allowed to pay in copper or billon coins (base coins containing a small proportion of silver to a very large one of copper), except in discharge of odd money, and to make up any of the fractions of a five franc piece.

In cash payments no discount whatsoever can be demanded, unless in the case of some special agreement to that effect, or where an established custom can be pleaded in favour of the demand. In the assertion of a custom of the kind, the nature of the subject matter of the sale and the local usages must be had regard to.

The usage established in certain places of commerce, which accords to the purchaser a delay for payment of several days, weeks, and even months, touches only the traders of the same place, and cannot be appealed to by strangers.

Where the contract states that the price of the goods bought is *payable* in so many days, weeks, or months, the credit accorded to the purchaser is absolute; but when the instrument says *to be settled* in so many days, weeks, or months, the debtor, in order to obtain the delay accorded, must remit to his creditor promissory notes or bills of exchange, or accept the creditor's draughts upon him, either of these instruments being made payable at the time of the expiration of the delay accorded.

If the creditor stipulates that the account is to be settled in *bills of exchange, or other negotiable instruments*, the debtor is bound to remit to him bills bearing at least *one* good name.

The debtor of an account *to be settled by bills or draughts* must remit such bills, and he is released only on the acknowledgment by the creditor of the receipt of such remittance.

If a creditor refuses to receive the draughts, &c., forwarded to him by a debtor in settlement of an account, he must return them to the latter, and ascertain that they have actually reached him.

If the creditor does not wish to run the risk of the loss or miscarriage of these draughts, thus refused and returned by him, he is entitled to inform the debtor by letter that he holds the draughts at the latter's disposition; in which case the debtor is bound to send for them.

Should the dispute between the parties, as to the acceptance or non-acceptance of the draughts remitted, continue up to the time when the bills fall due, the duty of presenting the bill or bills for payment and lodging protest in case of non-payment, devolves compulsorily upon the creditor, who remains still the holder of the securities.

If a debtor were to remit to his creditor bills so near due that there is not sufficient time left to present them for payment within the proper term, he would himself alone be answerable for all the consequences that might result from his dilatoriness or neglect.

The debtor cannot constrain the creditor to accept a payment on account.

The debtor behindhand in his payments is not by right liable to pay interest for the time that the payment is overdue, unless it is formally stipulated so in the contract; and even then the creditor is bound to give

proper notice to the debtor that payment is due; if he neglects to do so, he is not entitled to claim interest.

We have explained, in the chapters on the Sale and Delivery of Goods, that this notice may properly and validly be given through the medium of letters; but in the present case as regards the claim for interest, the French law demands that a legal notice be served on the debtor by an officer of the Court, called *huissier*.

If the covenant contains no stipulation as to interest, the latter counts only from the day that the creditor has brought his action *before the Tribunal.*

As regards promissory notes and bills of exchange (to which we shall devote a separate chapter), the interest counts only from the day of the protest.*

The French law limits to five years the time for which accumulated interest can be demanded. This prescription can only be barred by an action brought before the expiration of the five years, in which case a fresh term of the same duration is accorded.

The question has often been raised whether the stipulation of payment in *cash with discount,* implies, on the part of the debtor, by way of reciprocity, the condition of *payment of interest in case of delay.* The Tribunals appealed to to decide the point, have, in most instances, pronounced "that the payment of interest cannot be considered an implied condition, and that it requires a formal stipulation to make such payment obligatory in cases of delay."

* A protest is a declaration informing the party charged with the payment of the bill of exchange, and who refuses to pay it when due, that he will be held answerable for all damages and expenses; the protest must be notified to the debtor within twenty-four hours after payment falls due.

Where the debt belongs to several creditors in determinate proportions, settled either by the terms of the contract, or by decisions of law, *each one of the creditors may separately demand the share to which he is entitled.* If the creditors make a *joint* demand for payment, they must also give to the debtor a *joint* receipt.

If a debt is owing by several debtors, it is equally distributed between them, unless the contract or the law should have established a solidarity, or joint responsibility; in which case every individual debtor would be held liable for the total amount of the claim, and the creditor might choose any among them to sue for the whole debt.

Solidarity, or joint responsibility, exists manifestly in cases where the cause of the obligation is indivisible, as, for instance, where several persons purchase jointly *a share or an undivided quantity of goods, or give a joint indemnity against some risk or loss.*

In cases of this kind, the intention of the several purchasers, or sureties, to incur a *joint* responsibility, or solidarity, results evidently from the tenor of the contract, and from the nature of the obligations. But if, on the contrary, it is stated in the covenant that *two persons,* for instance, *purchase each* of them a certain quantity of, or *promise to pay each of them a certain fixed sum,* it is evident that it was the intention of the parties to incur only a divided and limited responsibility, and consequently, that no solidarity exists, and that neither of the two can be held responsible for more than his own share.

The heirs of a debtor are not jointly and severally responsible; each of them is liable only *in proportion to* his share in the inheritance.

The members of a civil society or association are not bound by the law of solidarity, but there exists a joint responsibility, or solidarity, between the several members of a commercial association.

A debt may be guaranteed by a third party, *with* or *without* solidarity with the debtor. In order to make the guarantee given a *bond in solidarity*, and accordingly to fix the surety with the obligation to pay the debt, no matter whether the actual debtor has been applied to or no, and to enable the creditor to elect proceeding against the surety in preference to the debtor, the bond must contain an express stipulation to that effect. In the absence of such stipulation the surety can only be sued after every means to obtain the amount from the actual debtor have been exhausted.

Exhausting the goods of a debtor means, to take out executions against all the chattels, real or moveable, which the said debtor is possessed of within a certain circuit from his domicile, and to take the necessary steps to effect the sale of the same, and the proper division of the proceeds. But the necessary funds for these proceedings on the part of the creditor must be supplied by the surety.

Where there are several sureties, and one of them has been compelled to discharge the whole debt for which they were jointly responsible, the one who has settled the claim may recover from his co-sureties each one their allotted share.

If a debtor alleges a release from his debt, the burden of proof lies on him. The production of the instrument or voucher of the claim is only regarded as presumptive evidence of such release; a *receipt alone* is held to be conclusive proof of the discharge of a debt.

A creditor who has lost the document proving his claim may, nevertheless, demand payment, if he can satisfy the Court that he really has a just claim against the alleged debtor.

If the document lost is a bill or note of hand, or other negotiable commercial security, the law imposes certain conditions or formalities upon the creditor, of which we shall treat in the next chapter.

If a creditor neglects to demand payment of his claim within a certain time, varying according to the nature and importance of the debt, the debtor is *legally presumed* to be released.

The following list will show the terms of limitation in the several different cases :—

Six Months	For sums due to schoolmasters and teachers, for lessons given by the month. To tavern and eating-house keepers, for victuals supplied. To workmen, artisans, and labourers, for wages.
One Year	For sums owing to physicians, apothecaries, and surgeons, for their professional visits, operations, &c. To bailiffs and summoning officers, for fees for serving writs, &c. To dealers, for goods sold to customers who are not themselves dealers. To the proprietors of boarding schools, for the board, &c., of the pupils. To servants hired by the year, for wages.
Five Years	For arrears of annuities and pensions; rent of houses and lands; interest on loans; and, in general everything payable by the year, or at certain fixed periods of longer or shorter duration.
Ten and Twenty Years	For the price of houses, freehold estates, or immovable chattels, ten years, if the real proprietor resides within a certain distance from the Royal Court in whose jurisdiction the property is situated, twenty years if he resides beyond that distance.

After the lapse of these several terms the debt to which they respectively refer is *barred or prescribed,* and the alleged debtor is released as a matter of right if he pleads this limitation.

Nevertheless the party whose claim it is endeavoured to bar by the plea of prescription, is entitled to put the defendant on his oath on the question to know whether payment has really been made. This oath may even be imposed on the widow or the heirs of the alleged debtor.

There is a fixed limit—viz., thirty years, after which all claims of *whatsoever nature* are prescribed, and the party pleading this prescription can no longer be called upon to take an oath in proof of his having satisfied an alleged claim.

CHAPTER VII.

ON BILLS OF EXCHANGE, OR DRAUGHTS, AND PROMISSORY NOTES.

Most commercial debts are settled either by bills of exchange drawn by the creditor on the debtor, or by promissory notes signed by the debtor to the order of the creditor, or also by the indorsement and transfer to the creditor of bills which the debtor happens to have in his possession.

This chapter, it will thus be seen, treats of matter of peculiar interest to the merchant.

"A Bill of Exchange," the French Law says, "is drawn at one place upon another place; it is dated, and states the sum to be paid, the name of the party who is to pay it (payor), the time and place of the payment, the nature of the value received, in coin, merchandise, or by way of account, or in whatsoever manner; it is signed to the order of a third party, or to the order of the drawer himself. If the bill is a first, second, third, or fourth, it must contain a statement to that effect."

A bill of exchange may be drawn upon one party, but made payable at the residence of another party, &c.

It is of great importance to be particular about the terms in which a bill of exchange is drawn, because a contract of this nature comprises the transfer to the interest of the bearer, of the funds to meet the bill in the hands of the drawer, and constitutes, with respect to all who affix their signature to it, no matter whether

merchants or no, a commercial instrument, which may involve personal arrest.

A bill of exchange must be drawn on stamped paper.

For greater clearness, we subjoin here a copy of a French bill of exchange as it ought to be drawn.

STAMP.

BON POUR F. 1000.

PARIS, le _____

Au _____ il vous plaira payer à A, ou à son ordre, la somme de Mille francs, valeur reçue en marchandise. Sans autre avis (ou suivant avis),

De votre Serviteur,

[Signé] TH. & CIE.

A MONSIEUR D.,

Banquier à Dijon.

English Translation.

STAMP.

GOOD FOR 1000 FRANCS.

PARIS (date).

On _____ (or, as the case may be, one month, two months, etc., after date) please to pay to (name of the party in whose favour the bill is drawn), or order, the sum of One Thousand francs for value received in goods. Without further advice (or as per advice).

From your Servant,

[Signed] TH. & Co.

To MR. D.,

Banker at Dijon.

Any instrument which does not combine the above specified conditions, would be considered, as far as the non-commercial signers of it are concerned, in the light of a simple promise to pay.

The expiration of a draught, or bill of exchange, is usually specified to a fixed day. However, custom has introduced also some different ways of fixing the time when payment falls due. Thus, a draught may be made payable one or several months after date; in which case the expiration is fixed for the corresponding day of the month indicated; as, for instance, a bill of exchange drawn on the 15th of March, payable three months after date, will fall due on the 15th of June. But a bill drawn on the 31st day of a month, payable two or three months after date, will fall due on the *last* day of the month indicated; as, for instance, a bill drawn on the 31st of December, at two months, will fall due on the 28th (or 29th, as the case may be) of February; and one drawn on the 31st of August, at three months, will fall due on the 30th of October.

The ancient commercial customs of France allowed one or several *usances* or delays for the payment of bills of exchange after acceptance. This is no longer the case. *Simple usance* embraced a period of thirty days (the space of time between any day of one month and the same day of the next).

It often happens that, for the convenience of the drawer, the payment of the draught is fixed one or several days, or one or several months, after sight. In such cases the period of expiration commences to count only from the day when the drawer writes his *visa* on the bill, for which a delay of twenty-four hours is accorded.

Bills of exchange being necessarily made payable to order, the transfer of them is effected by means of a declaration written on the back, stating the name of the party to whom the property in the bill is transferred, the value received, and the date of the transaction. This indorsement must be signed by the party in whom the property in the bill is vested at the time, or by his accredited agent or representative. In the common practice of commerce, the procuration or power of an agent or representative to act and sign in the name of the principal, is stated simply by the words *par procuration* (by procuration) being written above the signature. This declaration is not very explicit, and affords no means of ascertaining whether the procuration is genuine or not. An inconvenience results from this, which in some cases, has even entailed serious losses upon merchants and traders. In fact, if a draught were purloined or embezzled, and negotiated with a forged indorsement "by procuration," the real owner would unquestionably be admitted to prove that the said draught is his property, and that he never gave authority or procuration to any person to transfer it.

The holder of the bill would in that case find himself stripped of the title to its possession, which he thought to have acquired in the regular way, and his only remedy would be to bring an action against the pretended holder of the procuration.

It is always advisable, therefore, that the party to whom a bill of exchange is transferred by indorsement, should demand to see the power of attorney or instrument by which the procuration is conferred. The Bank of France, the Treasury, and all the large public establish-

ments demand the production of the procuration in all cases where an indorsement purports to be made *par procuration.*

The drawee, if he owes the draught, is *bound to invest it with his acceptance,* should it be demanded. A delay of twenty-four hours is accorded him to affix his acceptance to the draught presented.

The *visa* of a bill of exchange, of which mention was made, page 49, must not be confounded with the *acceptance.* The *visa* has for its object simply to fix the date of the expiration (the day when it comes due), and involves by no means an obligation to pay. The *acceptance,* on the contrary, is a *formal undertaking to pay the amount of the draught,* and should invariably be expressed by the word "Accepted," or some equivalent term written across the bill.

The holder of a draught which is refused acceptance by the drawee may make declaration of this refusal by a judiciary act,* called a *protest;* by this means he acquires a right to compel the indorser and the drawer of the protested bill to repay him immediately the amount, or to give security for the payment when due.

This measure has for its object to prevent the circulation of draughts without proper provision for payment.

An acceptance with restrictive conditions attached to it, or fixing a more distant date for the expiration of the draught than the one specified in it, would be held equivalent to an absolute refusal of acceptance.

An acceptance fixing the expiration at an earlier

**Acte d'huissier*—A *huissier* is a public officer, whose duty it is to draw up and serve at the residence of the parties concerned, official judiciary acts.

period than in the draught, would be held valid; only in the case of non-payment, the holder should take care to have the draught protested, both on the day when payment is promised by anticipation, and on the day when it comes actually due.

We have stated in one of the preceding chapters that the transfer of a draught confers upon the transferee a right of property in the *provision.*

We call *provision* the effects designed by special allotment for the payment of the draught on its expiration.

There is *complete provision* in the legal sense of the term whenever the drawee is indebted to the drawer, at the date of the falling due, in a sum equal to the amount of the draught. There is also actual provision in cases where effects, of whatsoever kind, have been allotted by the drawer to serve for the payment of the draught, no matter whether such effects have been transmitted for that purpose to the drawee, or to any other person.

The provision is only *partial* when the debt of the drawer, or the effects allotted for the payment, fall below the amount of the draught; in which case the privileged rights of the holder of the draught are restricted to the *actual amount of the provision;* for the balance the holder retains his remedy against the drawer and the indorsers.

Should several letters of exchange have been drawn on a party not holding sufficient provision for the total discharge of the whole of them, the provision actually held by the drawee would be applied to the payment of the said draughts in the order of the dates which they respectively bear; the draughts bearing one and the

same date would be paid concurrently; preference of payment would be given to accepted draughts.

In the case of the non-payment of the draught on its expiration, it is the interest of the holder to ascertain what effects have been, or are to be, remitted to the drawee, to serve as provision against the falling due of the said draught; considering that he may seize these effects, and lawfully claim them as his own, *to the exclusion of all other persons.* This privilege of the holder of a draught, for which provision has been assigned, is liable *only to one* exception—viz., if the drawer becomes bankrupt *after* having taken actual possession of the provision; since in that case the provision becomes the common property of all the creditors of the latter.

The drawer, the acceptor, and every one of the indorsers of a letter of exchange are jointly and severally bound to pay the amount of the draught to the holder. They are liable to personal arrest, in case of non-payment, no matter whether they are merchants or traders, or not.

This extensive application of so rigorous a measure as that of personal arrest, is attributable to the fact that a draught is held, in the eyes of the law, to constitute in itself a commercial operation with respect to all those who join in it.

There are two exemptions admitted from the operations of this rigorous measure—viz., in favour of married and unmarried females who are non-traders, and in favour of all persons having attained the age of seventy.

A party otherwise unconnected with the draught, may become solidarily bound with the parties directly

concerned in it, by guaranteeing payment for one or several of such parties; this is done by a *declaration to that effect* (termed in French, *aval de garantie*) put on the face of the draught, or by a separate special declaration to the same effect, and which should recite the guaranteed title with great care and minuteness, to guard against the possibility of doubt, misapprehension, or error. The party giving the guarantee (*aval de garantie*) is held responsible for the payment to the holder of the draught, in the same way and to the same extent as the party or parties for whom he has guaranteed payment; in short, he is solidarily bound with the persons guaranteed, and is accordingly even liable to personal arrest, unless exempted therefrom by either himself or the parties for whom he is surety, being in one of the two exceptional cases mentioned above.

In default of payment of the draught by the acceptor on the day of its expiration, and upon its presentation by the holder, the refusal of payment is certified by an act drawn up by a *huissier*, and which is called a *protest*. This act must be lodged at the residence of the debtor, unless the draught be made payable at some other place, in which latter case the protest must be lodged at the place appointed for the payment of the draught.

The form and terms of this protestation are settled by the law; the omission of one of the forms prescribed would annul the act; but the huissier would be responsible for the consequences of his neglect.

If the draught falls due on a Sunday or holiday, it must be presented on the day previous; and in case of non-payment, the protest must be lodged on the day following the Sunday or holiday.

The costs of a protest are very inconsiderable, usually not exceeding six francs (five shillings); when there is a change of residence of the parties, or the domicile of the acceptor, or of the party at whose place the bill is made payable, is a considerable distance from the town where the huissier resides, an additional expense of a few francs is incurred.

The fact that the bill has been properly presented for payment need not be certified, as the law takes it for granted upon the declaration of the holder. However, should the latter have failed to fulfil this obligation, and the fact of such default on his part can be proved, the consequence might be to saddle him with the expenses incurred.

It often happens that, in order to avoid the inconvenience resulting from the protest of an unpaid draught, the drawer or some of the indorsers indicate, on the face or back of the instrument, a correspondent to whom the holder is requested to present the draught for payment, in case the drawee should fail to discharge his obligation. Under these circumstances the huissier is bound to present himself at the domicile of the parties indicated, either to call upon them for payment, or to take their answer to his application.

The right of designating parties so to intervene in case of non-payment by the drawee, is limited to one party for the drawer and for each of the indorsers. If several intervening parties should present themselves and offer to reimburse the holder, the offer of that one will be accepted in preference who frees most of the parties concerned from their obligation, and the huissier is bound to draw up in the interest of that party a

special act of payment. Thus, for instance, the party who intervenes and pays for the drawer, obtains the *preference over all others*, because he thus liberates also *all the indorsers;* and for the same reason, he who intervenes and pays for the first indorser, takes precedence of those who simply offer to pay for the second or third indorser, and so on.

The party who has thus paid by intervention, acquires against the party for whom the payment has been made, and against all the other parties liable whose names *precede* the latter on the bill, an absolute subrogation in the right of the reimbursed holder.

A delay of fifteen days is granted to the holder of a protested draught, to exercise his remedy against the drawer and the several indorsers; this delay is extended one day for every five myriamètres (about thirty English miles) distance between the domicile of the said drawer and indorsers and the place where the draught was made payable. To the indorser who reimburses the holder the same delay is accorded to pursue his remedy against the other parties liable; and this delay counts from the day that payment was made by him. In the absence of a judiciary act certifying the day when the payment has been effected, the law allows that day to be ascertained and fixed by the correspondence on the subject, or by the evidence of the books of the party.

The delays stated in the preceding passages refer to draughts drawn in France and payable in France. In commercial transactions with foreign parts the delays are much longer, being fixed as follows:

Article 166 *of the Code de Commerce.*

"If letters of exchange drawn in France, and made payable beyond the continental territory of France in Europe, are protested, the drawers and the indorsers residing in France shall be sued within the delays here subjoined—viz., of two months, in the case of draughts made payable in the islands of Corsica, Elba, and Capraja, in *England,* and in the states bordering on France; of four months, in the case of draughts made payable in the other states of Europe, &c. &c."

The solidarity existing between the several parties liable to the payment of the draught, permits the holder to choose the party among them of whom he may deem it most convenient to claim reimbursement.

The formality of the protest, and the delays within which notice must be given of it and reimbursement sued for, have been established in the interest of the drawer and the endorsers, as it was deemed equitable *not to expose them* (in case of non-payment by the drawee) *for an illimited period* to the suit of the holder. If no protest has been lodged, therefore, or if the actions for reimbursement have not been brought within the proper time, the holder has lost his remedy against the several parties liable, with the exception of the drawee.

However, a special condition is imposed upon the drawer of a letter of exchange, in case the letter should not have been accepted by the drawee—viz., to be exonerated from all responsibility of payment, he must prove, *at his expense,* that there was provision at the date of the expiration of the draught. This condition

which the law imposes upon the drawer, is so rigorous that, as a constant rule of law, in cases where the drawee stops payment, or becomes a bankrupt at the time of the expiration or falling due of the draught, the drawer, though he had placed provision in the hands of the drawee to meet the draught, will yet not be held exonerated, because that provision has perished by the fact of the bankruptcy.

It is therefore always the wiser course for the drawer to look himself to the acceptance of the draughts for which he has given provision.

The remedy by action against the drawee may always be had recourse to, no matter whether the draught has been protested or no, up to the time of the *prescription of the title*, of which we shall speak hereafter.

The holder of a letter of exchange, the acceptor of which is declared bankrupt, may have it protested at once, to certify that circumstance, and pursue his remedy against the drawer or the indorsers, who are called upon either to reimburse the holder or to give security for payment when the bill falls due.

If an unaccepted draught happens to be lost, the party to whom it belongs may request the several indorsers successively, and the drawer, to make and sign a new draught in his favour, in lieu of the lost one. If the draught lost bears the acceptance of the drawee, the owner can only obtain a new draught by an application to the Court, before which he must establish his right of property in the lost instrument, and which he must move for a decree authorizing the creation of the new draught to replace the lost one. The Court then orders the party making the demand to give security

for a period of three years. This security is intended to protect the parties liable to the payment of the draught from a second demand of payment, which might be made upon them by a party in regular possession of the instrument alleged to be lost.

If, at the expiration of the lost instrument, the owner has not obtained a new one in the form before prescribed, he is not the less obliged to have an act of protest notified at the place where the lost draught was made payable. But he can only *demand* payment, either from the drawee or from the indorser, after having obtained the permission of the Court, and given the before-stated security; and let it be well understood, these acts must be performed by the owner within the time allotted to him to prefer his claims against the parties liable to the payment of the draught; the delays granted for that purpose have been specified in a preceding part of this chapter; the loss of the draught makes no difference in them.

The holder of a protested letter of exchange who pursues his remedy against one of the indorsers, or against the drawer, being obliged to claim at the domicile of the party whom he chooses to fall back upon, the funds which he has failed to receive at the place indicated on the draught, could not justly be charged with the costs incurred in the recovery of his money; the law authorizes him, therefore, to draw upon the indorser or the drawer, a new instrument, termed a letter of *re-exchange* (*lettre de rechange*, called also, in French, *re-traite*). This instrument must always accompany the protested draught and the act of protest; the sum for which it is drawn is made up of—

1. The amount of the protested draught.
2. The cost of the protest and of the stamp of the new draught.
3. Postage of letters.
4. Bank commission and brokerage.
5. Discount paid for the negotiation of the new instrument.

A statement of the several items of costs incurred (called in French *compte de retour*) must accompany the letter of re-exchange; this statement must be certified by a stock-broker on the Exchange of the place where the protested draught was made payable; and if there is no stock-broker in the place, by two licensed dealers.

We have stated that the interest on the amount of a draught lawfully runs from the day of the protest. But interest on the amount of the costs incurred, or specified in the statement accompanying the letter of re-exchange, is due only from the day that an action for payment has been brought.

The indorser who has re-imbursed the holder of a protested draught, in consequence of a return account (*compte de retour*), and has repaid him the costs incurred, cannot, on his part, draw a new letter of re-exchange and make a fresh return account of his own costs, as the principal debtor of the draught cannot be compelled to pay these costs more than once.

On Bills to Order (Promissory Notes).

The settlement of a debt is also often effected by means of a bill signed by the debtor to the order of

the creditor, and which is called a *bill to order*, or a *promissory note* (*billet à ordre*).

Article 187 of the French Code of Commerce says: "All that has been said here above with regard to letters (bills) of exchange, and concerning the expiration, endorsement, solidarity, guarantee (*aval de garantie*), payment, payment by intervention, protest, rights and duties of the holder, re-exchange, and interest, *applies equally to bills to order* (*promissory notes*).

Article 188.

"A bill to order (promissory note) is dated; it states the sum to pay, the name of the party to whose order it is signed, the time when payment is to be made, the value (consideration) which has been furnished in cash, in merchandise, by way of account, or in whatsoever other manner."

Form of a bill to order.

Bon pour F. 1000.

Paris, le 10 Decembre, 1850.

Au 10 janvier prochain, je paierai à Monsieur A, ou à son ordre, la somme de Mille Francs, valeur reçue en marchandises.

[Signed]

English translation.

Good for 1000 Francs.

Paris, the 10th Dec., 1850.

On the 10th January prox., I promise to pay to Mr. A, or his order, the sum of One Thousand Francs, for value received in goods.

[Signed]

There exists, nevertheless, a notable difference between a letter of exchange and a bill to order; it is this:—

We have stated that a properly drawn letter of exchange, or draught, constitutes of itself an operation of commerce with regard to all persons affixing their signatures to it, with the exception of non-trading married or unmarried females. It is not the same with a *billet à ordre;* this latter constitutes an act of commerce only when signed for a commercial cause.

This is an important difference, on account of the readier and more prompt jurisdiction of the Tribunals of Commerce, which is specially and exclusively reserved to deal with commercial affairs, and more particularly on account of the personal arrest to which every debtor for a commercial cause is liable.

Provision is of course out of the question in a case of a *billet à ordre,* which in reality is only a simple acknowledgment of debt on the part of the signer.

The letter of exchange and the *billet à ordre* are the only effects of commerce which the French law mentions. The silence of the law with regard to other effects also used in commercial transactions, proves that it is deemed desirable to see these other effects done away with, as being more injurious than useful to the public interest. We must, however, say a few words on the subject of each of these effects, which are, *le billet au porteur* (note payable to bearer), *le billet à domicile* (note made payable at the domicile of a third party), and *le mandat* (mandate).

The notes payable to bearer (*billets au porteur*) have almost entirely disappeared from the commercial market. Not being drawn to order, they do not constitute a

negotiable title; they simply engage the signer towards the party who has had manual delivery of them; and the inconveniences resulting from the loss of such effects are no doubt the cause of their gradual disappearance from commercial transactions.

The *billet à domicile* differs from the common *billet à ordre* (promissory note) only in this much, that it is made payable at the domicile of a third party. It is in frequent use with persons living out of the towns where they have their commercial dealings. The fact of their being signed in one place and made payable in another, *presumably* invests them with the character of a commercial operation. However, this presumption falls to the ground, if evidence to the contrary is adduced on the part of the signer.

The *mandat* (mandate, draft, order) is a species of bastard letter of exchange, containing usually the words *non acceptable*. This fact—viz., that the drawee is freed from the obligation of accepting, leads to the presumption that there is no provision. This description of instrument is therefore but little patronized by traders; a mandate, indeed, enjoys only the same limited confidence which is bestowed upon the simple *billet à domicile*. The Courts have decided that where the *exemption from acceptance is not inserted in the mandate*, the latter combines all the elements constituting a letter of exchange, as it contains the several conditions required—viz., 1. a drawer; 2. a drawee; 3. a party in whose favour the instrument is drawn; and 4. that it is drawn in one place and made payable in another; and that it consequently has the same effect as a letter of exchange, and confers upon the holder the

same rights. Be this as it may, however, we class this description of instrument among those which it will be found the more prudent course to eschew, as the parties concerned are exposed to the chance of an adverse judiciary interpretation and ruling.

Two observations of great practical utility find their proper place here, as they apply equally to all instruments of commerce of whatsoever description.

The first of these observations relates to the notice, *retour sans frais* (return without costs), which is frequently put upon commercial effects.

This notice upon an instrument of commerce is of a nature to create just apprehension in the mind of the merchant, to whom the law has so *imperatively* prescribed the formalities to be observed in cases of non-payment of a letter of exchange or a note to order.

In the opinion of men best able to form a judgment on the subject, the custom of placing upon draughts, &c., a notice exempting from costs, is most prejudicial to the best interests of commerce, because it opens the market to a quantity of paper signed by persons without substance.

Be this as it may, the Courts, in consideration of the fact that this practice, however so objectionable in principle, is an established custom, have ruled that the notice of *retour sans frais* put upon a letter of exchange, &c., is valid, and that it exempts the holder of a document of the kind from the obligation to perform certain formalities involving costs.

The duties and rights of the holders are, in this respect, as follows:

The holder of a draught, &c., bearing a notice of

retour sans frais, repeated by all the indorsers, is at liberty, in case of non-payment, to have the draught, &c., protested or not, as he thinks proper. If he has it protested, the costs of the protest *must be repaid to him*, notwithstanding the notice on the draught. But he cannot draw a letter of re-exchange, nor send a return account (*compte de retour*); and he must have the draught presented to the several indorsers, and to the drawer, without charge for the huissier, or even for postage.

If, relying upon the notice of *retour sans frais*, the holder omits to have the draught protested, none of the indorsers can object to his ulterior proceedings on the ground that there has been no protest; nor on the ground of a default of notification in a case where a protest has been lodged.

It is hardly necessary to observe that if the notice of *retour sans frais* has not been repeated by all the indorsers, the holder should proceed in the regular way, just as if none of the parties to the instrument had put any notice to the effect on it, in order that he may retain his remedy against *all* the parties, and not restrict it to those who may have put the notice on the bill.

Any party venturing to add a notice of the kind to any other signature but his own, would lay himself open to serious consequences, as such an addition would be looked upon in the light of an alteration of the draught.

Thus, the course to be pursued by the holder of a bill, &c., bearing a notice of *retour sans frais* is tolerably plain; still, we say, in common with many French

writers on the subject, the safer and wiser course always is to abstain altogether from commercial instruments bearing a notice of the kind.

The second observation relates to the absolute necessity of drawing letters of exchange, &c., in France on stamped paper alone.

The stamp duties on draughts, &c., are fixed as follows :—

For draughts of		100 francs and less			5 centimes		(½d.)
„	above	100 fr.	and up to	200 fr.,	10	„	(1d.)
„	„	200	„	300 „	15	„	
„	„	300	„	400 „	20	„	
„	„	400	„	500 „	25	„	
„	„	500	„	600 „	30	„	
„	„	600	„	1000 „	50	„	
„	„	1000	„	2000 „	1 fr.		
„	„	2000	„	3000 „	1 fr. 50 c.		
„	„	3000	„	4000 „	2 fr.		

and so on in proportion to the sum, adding 50 centimes for every 1000 francs.

Letters of exchange, &c., drawn in other countries on unstamped paper, or on paper marked with another than the French stamp, *must* have the special French stamp impressed upon them, before they can be in any way negotiated in France.

The French stamp offices are of very easy access.

Infringements of the stamp act are punished by a double fine—viz., five francs fifty centimes for every one hundred francs of the amount of the draught, inflicted upon the drawer or acceptor, and the same sum upon the holder. If the instrument has been drawn in some other country, the fine is paid by the party who has first negotiated it.

These fines are considerable, and a commercial document is so important an instrument, that surely no sensible merchant will incur the attendant risks for the sake of saving the trifling stamp duty.

All actions at law to obtain payment of an *effect of commerce* or *negotiable security* of whatsoever form, are *prescribed* after five years, counting from the day that the protest has been lodged or should have been lodged, or from the day of the last judiciary act in the case.

The term *judiciary act* (*acte judiciaire*) is employed by the law courts, but there is some vagueness about it; we will therefore give a definition of it: taken in connexion with other legal expressions, it signifies *suit*, or *action at law, not followed by a definitive judgment.*

To résume, then; the holder of any negotiable commercial instrument loses his remedy at law against all parties liable to the payment of the same, if he allows five years to elapse from the day after the expiration without bringing his action, or if, after bringing his action at law, he neglects for more than five years to follow it up.

But the parties pleading the statute of limitations are bound to *affirm by oath*, if challenged to do so by the plaintiff, that they have satisfied the claim, or that they are no longer indebted.

Where the statute of limitations is pleaded by the widow or heirs of any of the parties liable to the payment of the bill, such widow or heirs must affirm that, to the best of their belief, there is nothing due.

This oath is taken either before the tribunal where the affair is pending, or by special delegation before one

of the justices of the place where the party resides to whom the oath is tendered.

This rigorous prescription demanded by the necessities of commerce, applies, as we have said, only to negotiable commercial securities, that is to say, to regular letters of exchange, or any other document created by merchants or traders for the purposes of their dealings, or by any other person for a commercial cause.

As regards draughts signed for a cause reputed non-commercial, they are subject to a limitation of thirty years.

With regard to letters of exchange coming from foreign parts, the law of the country where they are made payable determines the period of their limitation. Thus, the English statute of limitations fixing six years as the term of prescription, a party having accepted in London a letter of exchange made payable in that city, can plead the statute of limitations only after *six* years, instead of *five, even though the acceptor should be a Frenchman,* and the action be brought before the French Tribunals.*

* Judgments delivered at Paris, on the 26th March, 1836, and 7th February, 1839.

CHAPTER VIII.

OF FACTORS (COMMISSIONNAIRES).

MERCHANTS that make it their special business to buy or sell goods on commission for others, are called *factors* (*commissionnaires*).

The name *commissionnaires* is given also to agents who simply undertake to effect the transport of goods. However, as all that it is useful to know on the subject of these latter has already been stated in a preceding chapter, we confine our observations here to the functions and acts of the factors.

The factor entrusted with a commission to buy or sell goods represents his employer in an absolute manner; but his commission presents this peculiar feature, that he acts ostensibly in his own name, instead of that of his employer, and that accordingly the third parties dealing with him are often actually left in ignorance even of the name of the real purchaser or seller.

There are also commercial associations, or companies, trading under a firm, engaged in the commission line.

The duties of the factor may be briefly summed up as follows:—

To act to the best of his ability in the interest of his principal, and to turn to the sole benefit of the latter all the advantages resulting from the operation entrusted to him. Any arrangement tending to confer some private advantage upon the factor, unknown to the principal, is a fraud.

The duty of the principal, on the other hand, is to bear the unfavourable results of the operation, and, under any circumstances, to indemnify the factor for all the risks which he runs, and for all expenses incurred by him in the execution of his commission. He must pay him, moreover, the amount of the commission stipulated; if no agreement has been made, the amount of the commission is determined by the custom of the place.

The factor has also the right to claim payment of interest on all advances made by him.

The factor is responsible to his employer for the faults committed by him in the execution of his commission; and, consequently, he is bound to make good any loss or damage that may result from such faults.

It would be difficult to give a clear and complete definition of the nature of the facts that may be held to constitute faults; we must therefore confine ourselves here to some general indications on the subject. Palpable negligence on the part of the factor in the execution of the orders received by him would constitute a fault. It is also held to be a fault if the factor, finding himself at the time when the order arrives precluded from executing it, fails to inform his employer immediately of the fact. The factor is also in fault if he departs from the established rules and usages of commerce, and the operation suffers in consequence thereof.

But mere deficiency of ability or expertness on the part of the factor will not constitute a fault. It is the employer's business to select his agent among the most able.

The factor, who entrusts to another party the execu-

tion of the orders received by him, is responsible for the acts of his substitute.

To constitute a perfect contract of commission, it is indispensable that the factor should have accepted the order given to him; no one can be called upon to execute an order which he has not accepted.

A contract of commission may be proved in the same way as all other acts of commerce—viz., either by deed drawn up before a notary, or by a signed agreement, or by the correspondence on the subject, or even by the depositions of witnesses.

In order to encourage the commission business, which presents unquestionable advantages in a commercial point of view, and also to facilitate the transit business with other countries, the law grants the factor, for the reimbursement of his advances, a lien on the amount of the goods consigned to him, no matter whether for sale or simply in transit.

However, to entitle the factor to claim the privilege of a lien, it must be established that he has been authorized to make advances, and that the merchandise is, on the day that he exerts his privilege, in his possession, or, at least, at his disposition, in another place than the consigner's warehouse. The reason for this condition is, that the possessor of merchandise may turn the fact of such possession to account as a means of sustaining or enlarging his credit, and that, to entitle a third party to a lien upon any merchandise, the proprietor of the latter must have given up possession of the same in favour of this third party. It is not necessary, however, that the expedition of the goods should actually have taken place at the time the advances have been made;

it suffices that the proprietor should have promised to expedite them.

The factor has no lien upon goods forwarded to him for advances made upon *former* consignments. Even if the proprietor of the goods should grant him permission to recover in this way his former advances upon the last consignment, his claim might be contested by the other creditors.

The only way to secure a lien on these goods for advances made upon former consignments, would be by a *deed of pledge;* of which we shall speak in the next chapter.

CHAPTER IX.

OF THE OPENING OF A CREDIT, AND OF LOANS ON PLEDGE.

We have just stated, in the preceding chapter, under what circumstances the factor is entitled to a lien upon the goods or merchandise consigned to him, in respect of any money or negotiable security advanced on the same. We will now proceed to state how a similar lien upon goods or merchandise may be acquired, independent of any contract of commission.

Any person may advance money, or open a credit, to the proprietor of goods or merchandise, and may acquire, in respect thereof, a special lien on such goods or merchandise, which will serve as a full protection against all claims on the part of other creditors. To this end it suffices to draw up a deed before a notary, or even a simple written agreement, stating,

1. The sum advanced or promised.

2. The nature, quantity, and marks or ciphers, if any, of the object deposited as a security for the advance.

This deed or writing must of necessity be registered. The goods or merchandise so deposited as security must remain in the possession of the creditor, or of a third party agreed upon.

If the debtor fails to repay the debt at the time appointed, the goods or merchandise deposited as security are assigned for the payment of the principal and

interest. But the sale of the pledge can only be effected after the creditor has given due notice to the debtor, and obtained the permission of the judge, who usually decrees a sale by public auction. However, the Court may also, at the creditor's demand, decree that he (the creditor) shall be permitted to appropiate the pledge to his own use, and hold it as his own property, at a price fixed by appraisement.

Every agreement which provides that, in case of failure of payment at the proper time, the thing pledged shall pass to the creditor, without such previous authorization and sale or appraisement, is null and void. Of course, if *after* the expiration of the term, the creditor and the debtor (if still solvent) choose to come to an understanding on the point, they are at liberty to settle it any way they may deem convenient. The object of this provision of the law is simply to prevent the creditor profiting by the indigence of his debtor, and imposing upon the latter onerous and oppressive conditions, which might enable the lender, in case of failure of repayment, to possess himself of the pledge at a low price. But when the loan has been made, and the term fixed for its repayment has expired, there is no longer any occasion for the interference of the law to protect the debtor, and the parties may be left at liberty to act in the matter as they please.

The registration duty on contracts of pledge for advances on goods and chattels moveable is one per cent. on the amount advanced. However, by a law passed in the year 1830, an exception is made in favour of merchants borrowing on merchandise and other effects

of commerce; in this case the duty is reduced to 1fr. 10c. (11d). But parties wishing to claim this reduction of duty must take care to draw up the contract of pledge with the greatest precision, so that it may fully bear out its commercial character.

CHAPTER X.

OF MARINE INSURANCES, AND INSURANCES BY LAND.

THE extensive relations of commerce existing between France and England, have long since made the merchants and traders of the two nations fully acquainted with the respective usages of the two countries in the matter of insurances, and which, with a few slight differences, may be said to be the same in both. The most striking difference consists in the prohibition made by the French law, to insure *the amount due for the freight* of the cargo of a vessel, and also *any expected profit on such cargo.* This prohibition has its ground in the wish of the law always to interest the owners of the vessel and of the cargo, and the captain, or master, in the safety of the vessel, as a contrary interest might lead to the most fatal consequences.

The two leading principles in a contract of insurance are:

1. The thing insured must exist in kind at the time the contract is made, and must be actually placed in peril.

2. The contract of insurance can never be made the object of a benefit for the insured.

The law requires that contracts of marine insurance shall be made in writing; they may be entered into and arranged between the parties themselves, and

simply signed by them, without the ministry or authentication of any public officer. The contract must contain the date, the time of the day, the name and quality of the parties, the name of the captain, or master, the description of the goods, and their estimated value, the port of embarkation and of destination, the places where the vessel will touch at, if they are known, the amount insured, the stipulated premium, and all other conditions agreed between the parties. It is customary to provide for the chance of difficulties arising, and to submit these to the decision of arbitrators, or referees, in order to avoid the necessity of having recourse to the ordinary Tribunals.

Contracts of this kind are generally made in France through the medium of insurance-brokers, who are specially appointed for the purpose. However, as we have already intimated, the parties to the insurance are at liberty to enter into the contract without the ministry of these officers.

There are no special regulations for land insurances against loss by fire, devastations of war, inundation, and other scourges; nor for inland navigation insurances.

The usages which obtain in insurances of this kind are borrowed mostly from the principles of the law on marine insurances, and the Tribunals admit also the same principles whenever there is analogy of position and possibility of application.

The ministry of insurance-brokers is rarely employed in land insurances. The companies provide special forms of policies ready drawn up beforehand.

The circumstance that such policies of insurance are

prepared beforehand by the companies, and contain accordingly always a number of stipulations to the advantage of the latter, predisposes the Courts, in cases of dispute, but little in favour of their pretensions, when they are not grounded on a very clear law text.

CHAPTER XI.

OF THE LAW OF PARTNERSHIPS, OF COMMERCIAL ASSOCIATIONS, AND PUBLIC COMPANIES.

THE vast industrial undertakings which are springing up every day, and more especially the construction of railways, bring the English nation constantly in contact with the commercial associations existing in France; this chapter is therefore of peculiar interest. As the restricted limits of the present work compel us to be as brief as possible on this important subject, we shall confine ourselves here to examine and treat of the rights of third parties in relation to commercial associations, and the rights of shareholders in all public companies.

There are several kinds of commercial associations or companies in France, which are founded respectively upon essentially different principles, and differ also greatly in their respective organization.

We will now proceed to examine successively these several kinds of associations, and discuss the distinguishing and characteristic features of each of them.

1. *The anonymous society* (*la société anonyme*) is constituted under the patronage and with the special authorization of the Government. It presents itself and trades under a denomination indicative of its object, and does not mention the name of any of the parties interested in it. Companies of the kind are, for instance, *la com-*

pagnie des glaces de St. Gobin (the Mirror Company of St. Gobin); *la compagnie d'assurances générales* (the General Assurance Company); *la compagnie du chemin de fer du Nord* (the Northern Railway Company), &c.

The principal characteristic of anonymous companies is, that they are composed of partners *bound simply* each to pay in the stake which he has undertaken to furnish, and are represented by managers or directors, personally irresponsible in respect of the debts or liabilities of the company.

Third parties doing business with such companies, have accordingly no other security or guarantee for the advances made by them to the said companies than the capital and effects possessed by the latter.

It is on account of this irresponsibility of the directors and managers that an anonymous company can only exist with the sanction of the Government, which, in the general interest of third parties, makes proper inquiries into the actual existence of the capital which the company professes to possess, and upon the strength of which it invites public credit, and also into the integrity and honesty of the managing directors.

Independent of these precautions, the Government appoints one of its agents to watch the operations of every anonymous company, and compels the directors to deposit at the record office of the Tribunal of Commerce, and at the Prefecture of the Department, a duplicate of the annual inventory, that every person interested may be enabled to inspect it.

The authorization of the Government may always be withdrawn. The revocation involves the dissolution and liquidation of the company that has incurred it.

As the leading principle upon which these associations are based affords parties a means of trading *incognito*, and more especially without incurring any personal liability, persons of rank and station are induced to join in industrial enterprises. The accession of such persons, on the other hand, inspires confidence to capitalists, and thus are formed those vast undertakings which we have named.

The social capital is mostly divided into negotiable shares, or shares to bearer, in order to interest a greater number of persons in the success of the undertaking. These shares are quoted in the Paris Stock Exchange; speculation lays hold of them, and makes of these readily transferable securities a new element of public credit.

To sum up, an anonymous company constitutes a moral entity vivified by a fiction of the law, and represented by the managing directors. The latter alone transact the business of the company with third parties, and accordingly they are the only parties to be proceeded against in case of dispute.

2. *La société en commandite* (*joint-stock company*—a company consisting of responsible active and irresponsible sleeping partners). This differs from the preceding in the following points:—1. It does not require the sanction of the government, and may be constituted by any body, by virtue of an authenticated deed before a public notary, or even by a simple agreement signed by the parties. 2. The managers of the company are personally liable for all its debts and engagements, no matter what their amount or importance; they are even liable to imprisonment for such debts. 3. The company must adopt a *firm*, comprising the name or names of

the manager or managers. The other, non-managing partners, called *commanditaires* (*sleeping partners*), are free from all liability to third parties, beyond the amount of capital respectively invested by each of them in the concern; but this freedom from liability is enjoyed by them only on the imperative condition that they remain entire strangers to the management of the company, which they can never represent, not even by procuration. The effect of this prohibition being to completely isolate the commanditaires, or sleeping partners, from the company, they may consider themselves, in respect of all commercial relations, as totally unconnected with the firm, and may trade with it in every way in the character of independent third parties.

3. *La société en nom collectif* (association in a collective name—partnership). This differs essentially from the two preceding.

All the partners are jointly and severally responsible for all the debts and engagements of the company, even though the names of all of them need not necessarily appear in the firm. The contract of partnership setting forth the rules of the association must be registered.

4. Finally, there is still another kind of commercial association recognised in France—viz., what is called *participation* (joint speculation, or copartnery). This consists simply in two or several persons joining in one or several determinate commercial speculations. Such associations are familiarly called, in France, *comte à demi*, between two persons; *comte à tiers*, between three persons, &c.

Different from the three preceding classes, this sort of association does not constitute a corporate body or

entity (*être moral*). Every one of the parties joined in it may make his arrangements with third parties for his own personal interest, and is held liable only for the engagements personally contracted by him.

We have to make here a most important remark relative to the *sociétés anonyme, en commandite,* and *en nom collectif.* The law imposes upon these associations the publication of their rules within a *fortnight* after the date of their formation, both by extract affixed at the Tribunal of Commerce, and by insertion in certain journals specially designated. In default of such publication, the precise terms of which are prescribed by the law, every partner or member of the association may at any time demand the dissolution of the social contract. This apparently exorbitant right has a very legitimate cause, having for its object to ensure the publication of acts which it is important for the public to know in order to guard against fraudulent manœuvres that might be resorted to if a solvent individual were permitted to conceal his partnership in a public or commercial company, and then in times of difficulty put forward in his stead some insolvent individual as the party ostensibly liable.

As this provision of the law is expressly intended to protect the public against fraudulent manœuvres on the part of the partners or shareholders of the company, the formalities of registration and publication only affect the position of such association, but not that of third parties; consequently, the absence of a contract of association, or the default of registration or publication, of course can never be taken advantage of by the company in its dealings with third parties. The latter have

always their remedy against the company and every one of its constituent members, no matter whether the said formalities have been fulfilled or not; bearing always in mind, however, that the simple commanditaire, or sleeping partner, is liable only to the extent of his investment, or the number of shares subscribed for by him, provided he has taken no part whatsoever in the management of affairs.

By a singular exception, all disputes arising between associates of a company, in matters concerning the latter, are submitted to *arbitrators*, who constitute a species of private jurisdiction *distinct from that of the Tribunals.*

The arbitrators are named as follows:

Each party designates an arbitrator on his part. If one of the parties refuses to name an arbitrator, the Tribunal of Commerce appoints one *ex officio*. If several parties have the same interest in common in the matter, they agree between them upon the nomination of a single arbitrator; if they cannot come to an understanding on the point, the nomination is left to the Tribunal of Commerce.

If the arbitrators so appointed cannot agree upon their decision, they must call in another gentleman to act as umpire, who will, after hearing the statements of the arbitrators, give his award in the case.

This truly paternal jurisdiction affords an immense advantage. It enables the parties to state in the quiet retirement of the cabinet, the grievances which have given rise to the dispute, and which are mostly of a private nature; and it facilitates the examination of books of account, the production of which is often

indispensable. On the other hand, however, it presents also some inconveniences. Thus, it often happens that each of the parties names for arbitrator a friend who feels much more inclined to act as an advocate in the case than as a judge, so that the third arbitrator, or umpire, who thus finds himself placed between two extreme opinions, and has not heard the question discussed from the beginning, is not in a position to fully and correctly understand and appreciate the case which he is called upon to decide, nor can he implicitly rely upon the impartiality of the two arbitrators.

To remedy this grave inconvenience, the associates of a company generally agree, in cases of dispute, to refer the matter from the beginning to *three* arbitrators, who hear thus all three the whole of the statements and arguments brought forward on both sides. In default of unanimity, the decision of the majority is given as the award of this Court of Arbitration.

The consequence of this mode of proceeding is, that the third arbitrator, being a stranger to the contending parties, exercises from the beginning of the discussion a salutary influence upon the other two arbitrators, and thus the parties may expect an impartial decision, unbiassed by any personal consideration.

CHAPTER XII.

OF COMMERCIAL SUITS, AND OF THE COMPETENT TRIBUNALS.

HAVING laid down in the preceding chapter, as briefly as possible, the general principles which, either in the form of actual rules and regulations of law, or in that of established usages, govern commercial transactions in France, we have now still to indicate the competent Tribunals to have recourse to, and describe the proper form and manner of proceeding in commercial suits.

The French Tribunals of Commerce are the competent Courts to apply to in all cases of dispute between French or foreign merchants or traders, provided, of course, the commercial operations which have given rise to the contention have taken place in France; for it will be readily understood that the Tribunals of a country will grant redress only on account of such commercial transactions as have taken place in that country, and under the protection of the laws there established.

We have stated, in the chapter on General Rights, that the *only distinction* which the French law makes between a French citizen and an alien, is, that it permits the former, if he has to claim of the latter a civil or commercial debt, to have his alien debtor arrested *before* judgment, and his goods and chattels seized, as a provisional precautionary measure, unless the said alien debtor gives such security as the Court may deem suffi-

cient. Whereas the same permission is not granted to an alien creditor against a French debtor, except *after* an adverse judgment given by the Court against the latter. (See page 4.)

The *Tribunal of Commerce* is composed of a President and several Judges, elected by the merchants of note of the district in which the Court holds its sittings.

The President and the Judges must be chosen from among merchants who have been established in business for at least five years. The Judges must be at least thirty years old, the President at least forty.

The President and at least two Judges are required to constitute a Court.

The Judges elected are appointed to the office by the Emperor, if they possess the qualifications demanded by the law, and also the moral qualifications which every magistrate or public officer is presumed to possess.

The sittings of the Court are held at fixed days and hours. They are public.

The parties are at liberty to plead their own cause, or to entrust the care and defence of their interests to whomsoever they may choose to depute, by power of attorney, to appear in their stead.

The obvious advantage of a proper experience of the Court and a thorough knowledge of the law, generally induces parties to put their case in the hands of a counsel or advocate. The general prevalence of this custom of employing counsel in commercial suits has led, in Paris, and in certain great cities of France, to the establishment of special advocates, who are called *agrées*.

The formalities to be observed in bringing before

these Courts the suits that fall within their cognizance are very simple.

The plaintiff calls the defendant to appear before the Court, by means of a summons, which must be served upon the said defendant by an officer of the Court (*huissier*), at least one day before the day appointed for the hearing. If the distance from the Court to the residence of the party summoned exceeds three myriamètres (about eighteen miles), an additional delay of one day is granted, and so on for every three myriamètres additional distance. The delay is considerably increased in the case of defendants residing beyond the frontiers of France; thus a delay of two months is accorded in the case of defendants residing in England, or in any of the countries bordering on France.

The summons is usually served at the place of residence of the defendant. But in the case of defendants residing beyond the frontiers of France, the service is made at the bar of the *Procureur Impérial* of the district in which the Tribunal of Commerce holds its sittings. That magistrate has instructions to forward the summons, through the diplomatic channel, to the hands of the party to whom it is directed.

If the party summoned fails to appear on the day appointed, the Court, on the demand of the plaintiff, pronounces default against the defendant, and, after hearing plaintiff's case, either proceeds to give judgment immediately, or appoints a future day for that purpose. This is what is called *judgment by default*.

The party against whom judgment has been given by default, has the right to put in opposition to that judgment by a simple notice served upon the plaintiff by

a huissier, together with a fresh summons to reappear before the same tribunal, within the proper delays fixed by the law. This opposition, which may be put in up to the very moment of the execution of the judgment by default, has the effect of absolutely suspending the force of the latter. The Tribunal subsequently either affirms, or modifies, or annuls its first decision, by a new judgment which is called *jugement contradictoire, i.e.*, judgment pronounced after the hearing of both parties. Should the party making opposition still fail to present himself before the Court, to support the grounds of his opposition (which indeed is often the case, as the step of putting in an opposition to a judgment by default is commonly resorted to by debtors for the purpose of gaining time), the tribunal pronounces a second judgment by default, which is equivalent to a full judgment (*jugement contradictoire*), and against which the measure of putting in an opposition cannot again be resorted to.

The right of putting in an opposition to a judgment by default ceases from the day that the party cast has declared his assent to the same, or else when execution has been suffered to take place without opposition. Execution is considered to have taken place when the condemned party has been arrested, or when his furniture or goods have been seized, and sold with his knowledge; or lastly, when the seizure of one or several of his estates or possessions has been officially notified to him.

The decisions pronounced by the Tribunal of Commerce after the hearing of both parties (*jugements contradictoires*), and in cases of waiver or forfeiture of the right of opposition, also those by default, are *final* in

all cases where the sum or value in dispute does not exceed 1500 francs (sixty pounds sterling). But when the sum or value in dispute exceeds 1500 francs, or is indeterminate, or where the action is brought to decide a question of principle, or of competence, or the legality of a personal restraint, &c., the said decisions are only judgments in the first instance (*en premier ressort*), and accordingly are subject to appeal.

Every decision in the first instance may be appealed against by the party condemned. The appeal from decisions of the Tribunal of Commerce lies to one of the Imperial Courts.

The delay granted for interjecting appeal against a decision in the first instance is three months, counting, in the case of a *jugement contradictoire,* or judgment after hearing both parties, from the day when the said judgment has been duly notified to the party appealing; and in the case of a judgment by default, from the day when opposition to it has ceased to be admissible.

The appeal is likewise notified to the respondent by an *acte d'huissier* (a notice served upon the latter by the proper officer). Should the intending appellant have *voluntarily* submitted to the execution of the judgment of the Tribunal of Commerce, an appeal on his part is no longer admissible. We say *voluntarily,* because there are cases in which the Tribunal of Commerce will decree provisional execution of the judgment, *notwithstanding the interjection of an appeal against that judgment;* and, of course in such cases, the party condemned being *compelled* to submit to the execution of the judgment, his right of appeal cannot be impaired by such *compulsory* submission.

Provisional execution is generally decreed by the judges *de premier ressort*, or of the lower Court, 1, if the claim in litigation rests upon an undisputed title, 2, if the plaintiff is notoriously solvent.

Provisional execution of a judgment in matters of commerce may always be demanded and obtained, on condition of the party demanding such execution giving security to the full amount of the sum or value in litigation, with interest and costs.

We have already had occasion to state, in the chapter on Letters of Exchange and other effects of commerce, that security may be given, either by paying the sum required into Court, or by a person notoriously solvent entering into a recognizance to the required amount, in due form, at the clerk's office of the Tribunal of Commerce.

There are twenty-eight Imperial Courts (*Cours Impériales*) in France. They are composed of gentlemen of the legal profession, selected from among the most eminent members of the bar, and appointed for life by the Emperor.

No Imperial Court can sit, composed of less than six Judges and the President.

The difference which exists between the first Judges in a commercial suit, and the judges of the Court before whom the appeal from the decision of the Tribunal of Commerce is heard, is at once apparent. The former are experienced merchants, and are for that very reason the fittest men to judge correctly in commercial litigations; whilst the superior knowledge of the laws and their proper application possessed by the latter, ensures that strict adherence to the spirit of the law by which all

legal decisions, no matter whether in commercial litigations or otherwise, ought to be guided.

The pleadings and arguments in a case brought before the Imperial Court, on appeal from the decision of the Tribunal of Commerce, are gone over anew in that Court, and the case is judged *de novo*, as if the former decision were not in existence.

The decisions pronounced by the Imperial Courts are called *arrêts* (decrees), and are to be executed without delay. Against those given by default, an opposition may be put in, in the same way and form as against judgments by default of the Tribunals of Commerce.

An appeal in *error* to the Court of Cassation lies against any of the decrees (*arrêts*) pronounced by the Imperial Courts, but only if such decree contains some vice or defect of form, or some provision or disposition contrary to the prescriptions or to the application of the law.

The *Court of Cassation* is a single and supreme Tribunal, which holds its sittings at Paris. The judges are appointed by the Emperor; they are selected from among the most eminent members of the Bench. Their mission is to watch over the correct application and interpretation of the law, in all judiciary decisions pronounced by the Courts.

Whenever a final decision or judgment (*arrêt en dernier ressort*), delivered by any of the Courts, violates the law, it may immediately be sent before the Court of Cassation, either by the party aggrieved, or, if none of the parties complain, *ex officio* by the Minister of Justice, for the better protection of the pure administration of the law.

One section of the Court of Cassation, called *Chambre des Requêtes* (Court of Requests), and which sits composed of at least fourteen judges, examines the appeal in error, and decides whether a violation of the law is apparent or not on the face of the judgment appealed against. If the Chamber of Requests decides this question in the negative, the appeal is at once dismissed, but if the decision is in the affirmative, the appeal is admitted, and sent for discussion before another section of the Court of Cassation, which is called *Chambre Civile* (Civil Court).

Before this latter Court the parties are admitted to plead by counsel.

If the Court, after hearing the parties, dismisses the appeal, the decision of the Court below is affirmed.

If the Court decides in favour of the appellant, it quashes the judgment of the Court below, and réfers the parties to another Imperial Court, which then hears the cause *de novo*, and pronounces a new decision.

It may happen that the second Imperial Court decides in the same sense as the first whose judgment has been reversed by the Court of Cassation, and that the parties refer this second decision again to the latter, which examines it in the same way as the first. If the Court of Cassation sees cause for it, it reverses the judgment of the second Court also, and refers the matter for *final* decision to a third Imperial Court, which is *bound* in its judgment to apply the *principles of law*, specially laid down for its guidance by the ruling decision (*arrêt*) of the Supreme Court.

The decisions of the Court of Cassation are absolute, neither subject to opposition, nor to appeal. A delay

of three months from the day of the notification of the judgment is granted for an appeal to the Court of Cassation.

An appeal from a judiciary decision, and a writ of error, are *ordinary* ways of procedure. There are two other means of redress, which are called *extraordinary* —viz., *la tierce opposition* (opposition by a third party), and *la requête civile* (civil request).

These two means of redress are pursued before the same courts which have pronounced the decision, and under the following circumstances:

Any party who finds a judgment or judiciary decree in its consequences prejudicial or injurious to his interests, and *who has not been called in the case*, or made a party to it, may protest against such judgment, or decree, by way of *tierce opposition.*

Any judgment or decree that has become *final*, may be attacked, by way of civil request (*par voie de requête civile*), by the parties condemned (*Article* 48 *du Code de Procédure Civile*):

"1. If there has been personal fraud.

"2. If the forms prescribed on pain of invalidity have been violated, &c.

"3. If decisions have been given on matters not demanded.

"4. If more has been awarded than was demanded.

"5. If the judgment omits to pronounce on the leading counts and points of the suit.

"6. If the Court deciding (*en dernier ressort*) has pronounced opposite judgments between the same parties, and on the same arguments.

"7. If one and the same judgment contains contradictory dispositions.

"8. If in a case where the law enacts that a communication be made to the Public Prosecutor (*au Ministère Public*), such communication has been omitted, &c.

"9. If the Court has judged upon the faith of documents which have since the delivery of the judgment been discovered or asserted to be forged or spurious.

"10. If since the delivery of the judgment, documents of a decisive character in the case have been recovered, which had been kept back by the adverse party."

It will thus be readily seen that these extraordinary means of redress are essentially protective.

The proceeding called *tierce opposition* is intended to protect third parties from being injured indirectly by the consequences of a lawsuit to which they are strangers.

The proceeding called civil request (*requête civile*), is intended to protect the parties to a suit from involuntary errors on the part of the judges, and also from the effects of fraudulent devices that might be resorted to to influence the decision.

A statement of the formalities required to be observed in having recourse to these two means of redress, though not very complicated, would yet involve a number of theoretical details and observations, which would swell the size of this volume without an adequate object. Parties who may have occasion to resort to either of these proceedings, had better consult a French advocate on the subject.

CHAPTER XIII.

OF LAW-SUITS AND PROCEEDINGS.

PARTIES adjudged to pay a debt incurred on account of a commercial transaction are compellable thereto by the seizure and sale of their furniture, effects, merchandise, and all their real and personal estate, and also by personal arrest and imprisonment. But before these executive measures can be carried into effect, notification of the judgment, or decree of condemnation, and order to pay, must be served upon the condemned party.

The seizure of the goods and chattels of the party condemned, and the attachment of his person, may be effected one clear day after service of the order of payment. But as regards his real estate, or houses and lands, a clear month is allowed to elapse after the service of the order of payment, before the creditor is permitted to seize.

The notification of the order of payment must indicate by which way of execution the prosecuting creditor intends to proceed—viz., whether by seizure, sale, or imprisonment. Where it is intended to resort to the latter measure (imprisonment of the debtor) the notification of the judgment and order to pay is served by an apparitor (*huissier*) specially appointed by the judge.

The duration of imprisoment for debt is limited by the law, as follows:—

Law of the 17th April, 1832.

Article 5. "The imprisonment for a commercial debt ceases by right after a term of one year, when the amount of the judgment debt is under 500 francs; after two years, when it is under 1000 francs; after three years, when it is under 3000 francs; after four years, when it is under 5000 francs; and after five years, when it is 5000 francs and above."

Article 6. "The imprisonment ceases also by right on the day the debtor enters his seventieth year."

The sale of goods and chattels or merchandise distrained is effected by public auction, in a place appointed for the purpose: the produce of the sale is applied to the payment of the debt, principal and interest.

The sale of real estate seized for debt, is also effected by public auction, and the produce equally applied to the payment of the debt, principal and interest; but the auction in this case takes place before the Civil Tribunal* of the place where the estate is situated.

If at the time when the produce of the sale is to be handed over to the execution creditor, there exist other creditors, the claims of these latter to the sum realized are all placed on the same footing with that of the former, at whose suit the sale has been effected; the execution creditor has a prior, or privileged claim, only for the costs incurred by his suit. Every creditor has a right to examine and ascertain the genuineness of the claims of the other creditors.

* For the power, &c., of the *Civil Tribunal*, we refer to the chapter on General Rights, where we have had occasion to speak of it, whilst treating of the provisional imprisonment of alien debtors in France.

There are, however, certain privileged debts which obtain payment in preference to all others. These preferential debts are defined by the law as follows:—

Article 2101 *of the Code Civil.*

"Preferential debts on all chattels in general are those enumerated here below; they claim payment in the order here following:—

"1. Law charges.

"2. Funeral expenses.

"3. Expenses of the last illness.

"4. Servants' wages for the year expired, and what is due of the current year.

"5. Provisions supplied to the debtor, or to his family," &c. &c.

Article 2102 *of the Code Civil.*

"The following are preferential debts on *certain* classes of goods and chattels:—

"1. The rent due for a house, farm, field, garden, &c., is paid in preference to all other claims out of the proceeds of the sale of the year's harvest, or of the fruits, or of the furniture, or of the house or farm, &c., rented.

"2. In the case of loans on pledge, the creditor, or pledgee, has a lien upon the pledge to the amount of the advance made on the same.

"3. The depository of a chattel has a lien upon the same for all expenses incurred in its safe-keeping.

"4. The price due for articles of furniture is a lien upon the same, if they remain still in the possession of the debtor, &c.

"5. An innkeeper, or hosteller, has a right of lien

upon the goods and chattels which the traveller or guest brings with him to the inn, in respect to the payment of the reckoning due for the entertainment supplied.

"6. A carrier has a lien upon the goods and chattels carried, for the payment of his hire, and of the accessory expenses incurred in the conveyance of the goods," &c.

Article 2103 *of the Code Civil.*

"The following are the liens, or preferential debts, upon land and real estate:—

"1. The vendor of an estate has a lien upon the same for the payment of the purchase-money, &c.

"2. The parties supplying the money for the purchase of an estate, house, field, &c., have a lien upon the same, &c.

"3. The co-heirs of an estate have a lien upon the chattels immovable belonging to the same, as a guarantee of the division of the property made or agreed upon between them, &c.

"4. The architects, contractors, masons, and other workmen employed in the building, re-building, or repairing of houses, canals, or any other structures whatsoever, have a lien upon the same.

"5. The parties who have advanced money for the payment or reimbursement of the workmen, &c., have a lien for the same upon the building, &c., constructed."

Beside the afore-mentioned measures of prosecution and execution, there are others, which are simply intended to *secure* payment of the debt; such are *attachment of moneys* in the hands of third parties, and *judicial hypothecation* (*hypothecary inscriptions*, or *entries*, on the lands and tenements of the debtor).

Every person having obtained a judgment of condemnation against a debtor, may, by virtue of the said judgment, attach all moneys due to the said debtor by third parties, and then make application to the Civil Tribunal* for a special judgment, ordering the said moneys so attached to be handed over to him in payment of his claim. If the same moneys are attached by several creditors, the claims of all of them are placed on the same footing, as we have already stated before.

Every person holding a judgment of condemnation against a debtor may have the amount of his claim entered as a charge upon the lands and tenements which the said debtor possesses in France. This mortgage or hypothecation establishes a lien, or privilege, in favour of the party executing it, upon the ulterior produce of the sale of the property, no matter whether such sale be effected by the debtor himself, or by order of the Court. Where several charges have been entered upon the same property, they take priority respectively, according to the order in which they stand; however, only after the preferential claims, or liens, enumerated above. (*Art.* 2103 of the *Code Civil.*)

These measures (attachment of moneys and hypothecation) may be effected even before judgment of condemnation has been obtained, if the creditor holds a voucher of the debt, such as a promissory note (*billet à ordre*), a letter of exchange, an acknowledgment signed by the debtor, &c.; and finally, they may be effected also by virtue of the permission of the Court.

* See Note, p. 97.

CHAPTER XIV.

OF LAW CHARGES AND EXPENSES.

From the extreme simplicity of the forms of procedure in commercial suits in France (see chapter XII.), the law charges and expenses incurred in such suits, and in the execution of the judgments obtained, are very moderate, which is a capital point in favour of the interests of commerce.

In principle, justice is dispensed *gratuitously*, in *this* sense, that the judges are paid by the Government.

The judges of the Tribunals of Commerce receive no remuneration whatsoever. Their functions are of a purely honorary character.

The emoluments or fees of the public officers (attorneys, notaries, apparitors, &c.,) charged with the management of law-suits, or with the service of notices, summonses, and other law processes, are very moderate, and are regulated by a tariff, under the inspection of the judges.

Counsel's fees are not fixed. The client who consults a counsel or advocate, or engages him to plead his cause before the Tribunal, hands over to him a fee, proportionate to the importance of the case and the talent of the man. Disputes never arise on this point.

The society of advocates or barristers, wishing to secure for their profession perfect independence and liberty of action, recognises the principle that every

one of its members is presumed to afford his professional services gratuitously, and cannot, therefore, maintain an action for remuneration for the same. It never happens that clients take an unfair advantage of this circumstance.

The most important charges connected with the proceedings in a suit are those imposed by the Government in the shape of *duty*, and which are proportionate to the amount awarded by the judgment of the Court, and in certain cases even to the amount *claimed* by the plaintiff. The following remarks will serve as a guide in this respect.

Legal proceedings to enforce a bargain or payment of a bond can be commenced only if the bargain or contract of sale or bond has been provisionally registered. The registration duty is two per cent. on the total amount of the sum involved, in the case of contracts of sale; one per cent. in the case of bonds. On a banking account (*comte de banque*) the duty is two per cent.; on a promissory note (*billet à ordre*) half per cent.; on a letter of exchange, quarter per cent.

A duty of one-half per cent. is levied besides on the amount awarded by the judgment of the Court, no matter for what cause, except it be in the shape of damages, in which case the duty is raised to two per cent. on the amount of the sum awarded.

Judgments disposing of disputed points without decreeing payment of a sum of money, are subject to a very trifling fixed duty, varying from two to five francs.

The stamped paper used in law-suits is also subject to a moderate duty. There are different sizes of stamped paper, which vary in price from 70 centimes (7d.) to 1 franc 25 centimes (1s).

These duties constitute the law charges invariably decreed by the Court, and which fall on the losing party. However, the plaintiff, or prosecutor, must always advance them, except in case of inability from indigence.

The costs incurred in the execution of the judgments of the Courts are moderate, and are also regulated by a fixed tariff.

The expense of attaching and imprisoning the person of a debtor is about 200 francs (£8 sterling). The maintenance of the debtor in prison costs about 25 francs per month, which the detaining creditor is obliged to pay.

Upon the whole, the law charges and expenses incurred in commercial suits in France, are by no means heavy, and it happens very rarely indeed that the dread of the law expenses will induce a creditor to refrain from the prosecution of his rights.

The government, in its solicitude for the indigent, has lately proposed and carried a law enabling indigent parties to sue *in formâ pauperis*, that is, without being obliged to make the least advance for law charges and expenses.

The public officers and the government have their remedy for their fees, and for the costs and charges incurred, afterwards, against the losing party, if that party is solvent.

It has ever been the custom of counsel in France to give gratuitous advice to the poor.

In the next and last chapter, we intend to discuss the law of bankruptcy, and the exceptional position in which a declaration of bankruptcy places the debtor and his creditors.

CHAPTER XV.

OF FAILURES AND BANKRUPTCIES.

THE paramount importance of the subject of this our last chapter, compels us to enter into somewhat larger developments than we have done in any of the preceding chapters; still we shall endeavour to be as concise as possible.

The French law relative to failures and bankruptcies differs essentially in its fundamental principle from the English and American bankruptcy laws, inasmuch as it provides that the creditors have a claim, not only on the estate possessed by the insolvent trader at the time of the bankruptcy, but also on the property which *he may acquire at some future period;* and that the bankrupt (*failli*) shall be held discharged from his debts and liabilities only by paying them in *full.*

The only favour which the French law grants to the bankrupt, is a provisional protection from arrest, in certain cases, and permission, with the consent of the majority of the creditors, to compound for his debts, by the payment of dividends thereon, proportionate to his means present and to come, and by such composition to secure for his person and property protection from all process. However, this *partial* release, or discharge, obtained by means of an arrangement, or composition (*concordat*) with the creditors, does not re-establish the insolvent trader in all the rights and privileges which

he has forfeited by his failure; these he can regain only by *payment in full* of all his debts and liabilities.

Having thus stated the ruling principle of the French bankruptcy law, we will now proceed to discuss the chief provisions of that law.

The trader-debtor who stops payment is in a state of bankruptcy; this state is held to exist virtually, and with all its consequences, even before the adjudication which declares it officially.

As the fixing of the *exact period* when the insolvent debtor stopped payment is of considerable importance, particularly as regards the appreciation of the acts done by the debtor previous to the official declaration of the bankruptcy, the adjudication fixes this date *provisionally*.

We say *provisionally*, because at the time of the adjudication some uncertainty may still exist regarding the actual position and conduct of the bankrupt, who is often interested in concealing them. It is, therefore, left open to any of the parties interested to demand the rectification of that date, if cause be shown for the same. The right of demanding such rectification ceases after the expiration of the periods allowed for the proof of debts.

In the interval between the time when the insolvent trader has stopped payment, and the official declaration or adjudication of bankruptcy, the said trader may continue his business, and all transactions really and *bonâ fide* entered into during such interval will be held valid, provided the person having any such intermediate transaction with the bankrupt, *was not aware* at the time of the fact of his having stopped payment.

The great difficulty in such cases is to prove the reality and *bona fides* of the transaction. The following remarks may in some measure serve as a guide in this respect:—

1. There are certain transactions which the law declares to be fraudulent, if entered into during the interval between the suspension of payment and the adjudication of bankruptcy, and which are accordingly prohibited, and held to be null and void.

Article 446 *of the Code de Commerce* says:—

"Are null and void as against the estate the following transactions if entered into by the debtor since the date fixed by the Court as that of the suspension of payment, or within ten days immediately preceding that date: All transfers and conveyances of property, real or personal, without a valuable consideration; all payments, whether in cash, or by transfer, sale, set-off, or otherwise, for debts *not yet due;* all payments *made otherwise than in cash, or effects of commerce* (*negotiable securities*) for debts *due;* all mortgages and liens by way of pledge on the property of the debtor, on account of debts *previously* contracted."

2. As regards other transactions, not comprised in the above enumeration, the person demanding their being declared null and void by the Tribunal must prove that they are of a fraudulent character.

After *the day of the adjudication, or official declaration of bankruptcy,* the bankrupt can no longer dispose of any of his property or goods *in any way whatsoever,*

all his estate, real and personal, vests in the syndic or syndics, for the benefit of the creditors.

The bankrupt who removes, conceals, or embezzles any part of his estate, commits a *felony*, which is termed in France, *fraudulent bankruptcy*. The insolvent trader who has squandered his estate by misconduct, extravagance, or hazardous speculation, is deemed guilty of a *misdemeanour*, which is termed *simple bankruptcy*. For the offence of fraudulent bankruptcy the insolvent trader is liable to be sent to the hulks (*travaux forcés*): for the offence of simple bankruptcy he is liable to imprisonment in a house of correction.

The preceding remarks show the distinction which the French law makes between *failure* and *bankruptcy*, and the protection afforded by it to creditors against dishonest debtors. We shall here omit altogether from consideration that part of the subject which the French law calls more specifically "bankruptcy," and confine our observations exclusively to the subject of *failures properly so termed* in France, but to which, in conformity with the English practice, we will henceforth apply the name of *bankruptcies*.

The trader who finds himself in a state of insolvency, must within three days after suspension of payment, file a declaration to that effect in the registry of the Tribunal of Commerce of the district in which he resides. This declaration must be accompanied by a statement of his debts and assets, which is termed a *balance-sheet* (*bilan*). Upon the filing of this balance-sheet the trader is adjudged a bankrupt by the Court.

If an insolvent trader fails to state his position

to the Court, and file his balance-sheet, any one of his creditors may demand an adjudication of bankruptcy against him; and the Court may even pronounce such adjudication *ex officio*, that is to say, even in the absence of a petition to that effect.

In cases where an adjudication of bankruptcy is thus hostilely demanded against a trader-debtor, and the latter opposes the granting of such adjudication, difficulties may arise as to the proper appreciation of the facts constituting the suspension of payment, and the sufficiency or insufficiency of the cause shown in support of the petition. The Tribunals have in this matter a discretionary power. We will here briefly state the general spirit and intention of the law which guides the decision of the Courts in disputed cases of the kind.

The mere refusal of a trader-debtor to meet some of his engagements is not of itself sufficient to constitute an act of bankruptcy. Such refusal may arise from an infinite variety of purely accidental causes, such as, for instance, an error in the account, a voyage, a serious dispute, &c. The error is rectified, the voyage terminates, the dispute is settled, funds that were temporarily tied up become again available, and the liability is ultimately discharged. In all such cases there is no actual suspension of payment, and the Court will pronounce in favour of the trader against whom adjudication of bankruptcy is demanded. But on the other hand, the Court will not stay the issuing of the adjudication upon idle and frivolous grounds.

It happens sometimes that suspension of payment is openly declared only at the time of the death of the debtor, in which case the law will still grant an adjudi-

cation of bankruptcy against the deceased, but only if *the state of suspension of payment shall have virtually existed before the demise of the trader,* and *not have been occasioned by that event.* This is a wise distinction, as there are many traders who die solvent, and would have been able to meet all their engagements had death not stopped their career. It will surely be admitted that the issuing of a fiat of bankruptcy under such circumstances, would be an act of injustice, and that the provisions of the law which enacts that, to justify a petition for adjudication of bankruptcy, the state of suspension of payment must have been manifest *before* the demise of the trader, are both merciful and wise. In the same spirit the law has also provided that the right of demanding an adjudication of bankruptcy against the estate of a deceased trader shall absolutely cease *one year* after the day of the demise of the latter.

The official declaration of the failure of a trader must be posted up at the hall door of the Tribunal which has pronounced the adjudication, and advertised in certain public journals specially nominated for that purpose, in order that no person may pretend ignorance of the fact of such fiat of bankruptcy having been issued.

The judgment declaring the bankruptcy orders the provisional arrest of the bankrupt, and his detention in a prison for debtors; or it simply appoints a special officer to watch the person of the bankrupt.

However, if the bankrupt bears a good character, and the balance-sheet filed by him is deemed satisfactory, the Court may, by a special order, termed *sauf-conduit* (protection), exempt him from the operation of these rigorous proceedings.

Forthwith upon adjudication of bankruptcy, all the estate, real and personal, of the bankrupt, is immediately vested in the Court, and the administration and realization of the estate, and the necessary proceedings and operations in the bankruptcy, are confided to one or several *syndics* (assignees), who are to give sufficient security, and are appointed to act under the supervision of a judge of the Tribunal of Commerce, specially charged in this behalf, and who is called *Judge-Commissioner*. These syndics immediately draw up an exact inventory of the estate, and proceed to the verification of the debts, as will be hereinafter explained.

It sometimes happens that the syndics are empowered, during the time occupied in the necessary proceedings and operations in the bankruptcy, to provisionally carry on, within the limits of the available estate, the business of the insolvent trader, with or without the assistance of the latter. Thus they may keep open the shop or establishment of the bankrupt, purchase the requisite stock, order the completion of articles in progress of manufacture, &c.

This provision of the French bankruptcy law is intended chiefly to keep up, as much as possible, till the final winding-up of the accounts, the value of the bankrupt's stock-in-trade, plant, manufactured articles, &c. The careful supervision which the judge-commissioner exercises, and the regularity with which the accounts of the syndics are generally kept, leave little room for those abuses that otherwise might attend such provisional administration of the bankrupt's estate.

Having thus briefly enumerated the consequences resulting to the insolvent trader personally from an

adjudication of bankruptcy against him, we will now proceed to state the effect of such adjudication in what concerns more particularly the interests of the creditors.

From the instant the adjudication is pronounced, payment may *at once* be demanded of all debts due to the bankrupt, no matter what may be the period of their falling due, or the extent of credit originally given.

From the day of the adjudication, interest ceases to run on any debts due by the estate, save on those which are guaranteed by a pledge yielding interest; on these the interest continues to be paid to the creditors so secured.

The owner of the premises occupied by the bankrupt and where his business or trade is carried on, must suspend for one month all proceedings for the recovery of any rent that may be due, to enable the syndics to realize the requisite funds for the payment of such rent. However, in cases where the lease expires in the course of the month, the landlord may exercise his rights immediately.

The creditors' right of action against the bankrupt for the recovery of their debts ceases from the day of the adjudication, since the bankrupt is then divested of all property. *Privileged* or *secured* reditors, however (ch. XIII. p. 98), retain a special right of action in case the syndics, or assignees, fail to settle with them. True, it is not usual for secured creditors personally to realize the value of the objects on which they have a lien; in most cases they leave it to the syndics to effect the sale of such objects, and receive from their hands the amount of their claim; still, it is incontestable that should the syndics delay such sale or realization, the

secured creditors may themselves proceed to effect it, in the presence of the syndics duly invited to attend.

All law-suits concerning the bankrupt must be brought against the syndics who represent him. In the same way, all actions undertaken in the interest of the estate against third parties, must be brought at the instance of the syndics.

The Court may, if the judge thinks proper, authorize the bankrupt to join in such actions.

The syndics are bound to deliver to the judge-com missioner, within a fortnight after their appointment, a memoir, or summary report, setting forth the apparent condition of the estate, the principal causes of the failure, the circumstances attending it, and the principal features which it presents. This report is forwarded by that magistrate to the Procureur Impérial, one of the chief law officers of the Crown, who examines it, and decides whether society has an interest to inquire into the conduct of the bankrupt, and whether there is cause to proceed against him for acts of simple or fraudulent bankruptcy.

Immediately after the inventory is taken of the estate and effects, the syndics proceed, with the aid of the books of the bankrupt, and of all the papers and documents of which they have taken possession, to verify the balance-sheet filed by the bankrupt. Should the latter not have filed a balance-sheet, the syndics prepare one, and deposit it in the registry of the Tribunal of Commerce.

With the aid of the information contained in the balance-sheet, the registrar of the Court invites, *by letter addressed to every individual creditor* whose name

appears in that document, and by advertisement in some public journal or journals, specially designated to that end, the creditors of the estate to deposit in the hands of the syndics appointed the titles of their debts and claims, and the papers or documents in support of the same. A term of fourteen days (*quinze jours*) is allowed to the creditor for the production of such titles, &c.

To creditors residing abroad a longer time is allowed for this purpose, in proportion to the distance of the country in which they reside; in the case of creditors residing in England, the time allowed is two months. However, this extension of time in favour of foreign creditors, and which may be as much as one year in the case of those residing in countries very far off, does not delay the operations in the bankruptcy, which are proceeded with after the expiration of the first fortnight.

The titles of the debts or claims must be accompanied by a summary account (*bordereau résumé*) written on French stamped paper, in the form here annexed:

TIMBRE IMPÉRIAL. 35 centimes.

Bordereau de la créance de M. A, demeurant à

dans la faillite du sieur B, marchand, etc. . . . . demeurant à

(*Désigner ici la nature et la somme de la créance.*)

(*Si c'est un compte courant le copier tout au long.*)

Dater

Et signer

Translation.

STAMP. 35 centimes.

Amount of the debt claimed by Mr. A., of

against the estate of Mr. B., merchant, &c., of

(*State the nature and amount of the debt.*)

(*If it is an account current, copy it* in extenso.)

Date

Signature

The syndics proceed to examine the several claims as they are sent in to them. If they find such claims to be real and *bonâ fide*, and that they agree with the writings and statements of the bankrupt, they admit them by a declaration to that effect, written either on the instrument itself, or on the account (*bordereau*) accompanying it. However, that admission of debt is definitively settled only in the general meeting of the creditors specially called for that purpose. In cases where the syndics dispute the validity of the title by virtue of which a creditor prefers a demand against the estate, the judge-commissioner examines into the case, and endeavours to bring about an arrangement between the parties; if he fails in this, he sends the latter (the syndic, or syndics, and the creditor whose demand is disputed) before the Tribunal of Commerce. The decision given by that Court is either final, or subject to appeal, according to the importance of the matter in

dispute. We have explained in chapter XII. the manner of procedure before the several Courts to which recourse may be had in commercial suits.

Every creditor inserted in the balance-sheet, or who has proved his debt, is entitled to oppose before the judge-commissioner, or before the Tribunal of Commerce, the admission of the debts claimed by others. But by way of precaution, to guard against idle or vexatious opposition, the law provides that the party so opposing shall pay the costs of the proceeding, if the decision goes against him.

After the debts and demands have been properly verified, the creditors are called upon, either personally or by agent, to affirm *on oath*, before the judge-commissioner, the truth of their respective demands. If a creditor refuses to swear to the truth of his debt, his demand is rejected.

Within the three days after the time prescribed for the affirmation of the debts, the registrar of the Tribunal invites the creditors *whose debts have been duly verified and sworn to*, to meet, under the presidency of the judge-commissioner, for the purpose of hearing the report of the syndics on the actual state of the bankruptcy, receiving the proposal of the bankrupt, and deciding whether he deserves the favour of a composition (*concordat*) at their hands.

As the decision of a *majority* of *three-fourths in value*, and a *simple majority* (*majority of one*) *in number* of the creditors present, is held binding on all creditors, it will at once be seen how important it is to every one of them to attend this general meeting. The law has for this reason provided that disputed debts

shall be provisionally admitted whilst the matter is pending before the Tribunal, so that the claimant may participate in the deliberations of the meeting of creditors.

Foreign creditors will, therefore, always do well to anticipate the time legally allowed for the production of their claims, and, by the speedy proof of their debts, place themselves in a position to participate in the important deliberations and decision of the general body of creditors.

The law lays down no particular conditions on which the proposal of the bankrupt to his creditors is to be based. The nature of such proposal greatly depends upon personal considerations, and upon the circumstances of the case, and varies accordingly *ad infinitum*. In most cases, however, the insolvent trader asks his creditors to remit a part of their claims, and promises to discharge the remainder in fixed instalments, at stated periods. If three-fourths in value and one more than half in number of the creditors consent to accept the proposal made by the bankrupt, the latter resumes possession of his estate and effects, and continues his business as before, on the sole condition of paying the promised instalments.

If the bankrupt who has so compounded with his creditors subsequently fails to keep his promises, and neglects to pay his instalments at the appointed periods, the creditors may have him deprived of the benefit of the composition, by an application to that effect made before the Tribunal of Commerce. If the application is received, the Tribunal orders the resumption of the operations in the bankruptcy, and re-appoints syndics,

who take possession again of the estate and effects of the bankrupt, verify the new debts, and take proper cognizance of the modifications which have meanwhile taken place in the old debts. The renewed proceedings in the bankruptcy are carried on before the judge-commissioner, in the same manner as stated above.

In cases of the kind the insolvent trader is still permitted to make another proposal of composition, since it is possible that the non-fulfilment of his promises under the first arrangement may have arisen from his having undertaken obligations too heavy for him to fulfil. Should the insolvent trader again fail to keep his engagements under the new arrangement, he *definitively* forfeits thereby the benefit of such arrangement, and the further proceedings in the case are then conducted in the manner hereinafter stated (see page 119).

If the circumstances of the failure have destroyed the commercial position of the insolvent trader, and it is impossible for him to continue his business, he usually offers to his creditors, by way of composition, the cession to them of all his estate and effects, and a small dividend besides, to be paid either from the private means of his family, or out of his future earnings. In such cases the creditors entrust to one or several commissioners, who usually are the late syndics, the office of realizing the assets ceded to them, and rateably distributing the proceeds among them.

Privileged creditors are excluded, on pain of forfeiting their right of privilege or lien, from all participation in the deliberations on the arrangement to be made with the bankrupt.

The latter provision of the law is intended to secure

identity of interests in the creditors who vote on the question of the composition to be accepted from the bankrupt. Any creditor who receives from the bankrupt any undue advantage, as an inducement to assent to the composition offered by the latter, commits thereby a misdemeanour, which may be punished by fine and imprisonment (Law of 1838).

The composition (*concordat*), though assented to by the creditors, requires still for its *definitive* completion the sanction (*homologation*) of the Tribunal, which, after hearing the report of the judge-commissioner, considers whether such sanction shall be given, in the interest of the creditors and of commercial morality.

If the Tribunal decides that the arrangement shall receive its sanction, it pronounces a decree to that effect, and declares the arrangement binding on all creditors of the bankrupt; in the same decree the Court *absolves the bankrupt from all blame*, and certifies that his failure has arisen from *unavoidable losses and misfortunes*.

If, on the other hand, the Court is of opinion that the creditors have been misled in the matter of the composition, and that the proposal made by the insolvent is not satisfactory; or, if the Court holds that the bankrupt does not deserve the indulgence which the creditors are willing to extend to him, it may refuse its sanction, in which case the arrangement (*concordat*) is *annulled*.

The insolvent trader who has been found guilty of the misdemeanour of *simple* bankruptcy, is not necessarily precluded thereby from the right of a composition with his creditors. But this favour is absolutely refused to the insolvent trader who has been adjudged guilty of the crime of *fraudulent* bankruptcy.

These provisions of the law show how fully both the general interests of society and the private interests of the creditors are protected.

If the creditors reject the proposal of their debtor, or if the arrangement assented to by them is subsequently annulled by the Court, the creditors are by the simple fact of such rejection or annulment, constituted into a kind of *body-corporate*, termed in the French Bankruptcy Law *union*, for the joint protection of their rights and claims upon the estate and effects of the bankrupt.

The *union* is fully established by the decision of the meeting of creditors which rejects the proposal of the debtor, or by the judgment which annuls the proposed arrangements. It is *represented by syndics*, designated by the creditors, and appointed by the Tribunal.

These syndics proceed to collect the estate, real and personal, of the bankrupt. They then distribute the total proceeds rateably among the creditors, keeping in hand a sufficient sum to pay a dividend to those foreign creditors who have not yet proved their debts, but who are still within the legal period allowed them for the production of their vouchers. After the expiration of the legal periods, the sum kept back is definitively distributed among the creditors.

The syndics are commissioned also to collect the estate and effects which the bankrupt may have acquired after his failure, no matter in what manner, and to distribute the proceeds among the creditors; but they are bound to admit to the benefit of such distribution any new creditors that may then exist.

In the case of the bankruptcy of a commercial company, the syndics, besides collecting the assets of such

company and distributing the proceeds among the creditors, have to collect also the *personal* estate of every individual partner, and to distribute the several proceeds concurrently between the creditors of the company and the respective personal creditors of each partner.

But, before proceeding to any distribution of the estate, the syndics are imperatively called upon to arrange about the rights of the *preferential* creditors; of the creditors *secured by pledge* or *mortgage;* of parties *claiming the restitution* of commercial securities or *goods* transmitted to the bankrupt under certain *peculiar circumstances* presently to be explained; and also about the *rights* of the bankrupt's *wife.*

In chapter XIII., page 98, we have given a list of the several creditors who have a legal privilege or lien upon the estate, real or personal, of their debtor. In chapter IX. we have indicated those creditors who are *regularly* secured by a pledge. We have now to add here that the intervening bankruptcy of the debtor does not in any way alter or vary the privileged position of the said creditors; and that should the syndics of the *union* neglect to pay any such creditor the amount of his debt, he may demand permission of the Court to sell the object pledged to him as security, and pay himself out of the proceeds, handing over the surplus, if any, to the syndics.

As regards the right of *revendication,* or claiming the return of commercial effects or goods transmitted to the bankrupt under certain peculiar circumstances, the following are the provisions of the law:

The principal who has transmitted to the bankrupt,

previous to the adjudication, commercial securities, &c., with instructions to cash them, and apply the proceeds to some particular purpose, may claim the return of such documents, if they continue still in the portfolio of the bankrupt. The consignor who has forwarded goods to the bankrupt for sale on commission, may demand the return of such goods if they remain still unsold; or, if sold, but not yet paid for, he may demand payment of the price to be made direct to himself.

Lastly, the unpaid vendor is entitled to recover and retain possession of the goods expedited to the bankrupt, so long as the said goods are *in transitu*, and have not been actually delivered at the warehouse of the bankrupt or at that of his agent. But the unpaid vendor can no longer exercise his right to recover and retain possession of the goods if the purchaser has sold them whilst *in transitu*, on a bill of lading or carrier's invoice.

The syndics may always, if they think proper, oppose the retaking of the goods by the unpaid vendor, by paying him the price agreed upon, or giving security for the payment of the said price when due. This course is usually taken if the goods have risen in value.

The rights of the wife of the bankrupt are usually determined by her marriage-settlement; in default of such settlement, they are determined by the Code Napoléon.

The following are the provisions of the law in this respect:—

The wife of the bankrupt retakes *in kind* the real estate *which she has brought* to her husband, and also the real estate that may have since come to her by

inheritance, or *donation,* or have been bequeathed to her by *will.*

She retakes also the real estate that may have been acquired *in her name,* with moneys *derived from inheritance, donation,* or *testamentary bequest,* and of which the source has been recorded by an *authentic* deed.

She retakes, likewise, the moveables (articles of furniture, *objets mobiliers*) which she has brought to her husband, *provided such articles are described in her marriage-settlement;* and also the moveables that may have come to her by inheritance, donation, or testamentary bequest, *provided such moveables are mentioned in an authentic deed.*

She preserves a right of legal hypothecation, or lien, on the estates *possessed by her husband on the day of the marriage,* or which have come to him since by *inheritance* or *by way of gift.* But she has no right of lien upon the real estate purchased by her husband *since the marriage.* This latter provision of the law is intended to prevent the fraud of *traders* purchasing with the moneys of their creditors estates as a means to ensure the reimbursement of their wife's dower.

As regards the claims the wife may have against her husband for moneys which she has brought to him, either at the time of the marriage, or since, she has no lien whatsoever, and must present herself as a creditor of the estate exactly on the same footing as all the other creditors. All particular benefits granted to her by the husband at the time of the settlement, and the gifts since made to her by him, are invalid, and can no way profit her after his failure.

In all cases the judge-commissioner may authorize

the assignees of the estate—as is indeed almost invariably done—to restore to the wife of the bankrupt her own wearing apparel and that of her children, and also the indispensable articles of furniture.

When the whole of the estate is collected, a general meeting of the creditors is held, under the presidency of the judge-commissioner, and in presence of the bankrupt, to receive and audit the accounts of the syndics.

The costs of the proceedings in the bankruptcy and the fees of the syndics are deducted from the produce of the estate, and the balance remaining is then rateably distributed among the creditors.

With the audit of the accounts of the syndics, and the distribution of the assets, the *union* of the creditors is dissolved.

From this time forward every creditor regains his right of *individual* action against the bankrupt, and may proceed against him for the recovery of the balance of his debt, by all legal means, not even excepting personal arrest. And to these attacks on the part of his creditors the bankrupt remains exposed for a period of thirty years.

The insolvent trader who has obtained the favour of a composition is evidently in a better position than he to whom this favour has been refused, since the former is freed from his debts on the sole condition of paying certain dividends at stated periods; whilst the latter remains exposed for a period of thirty years to the attacks of his creditors. Still, the moral stigma that attaches to the name of *bankrupt is the same for both,* and they are both *equally deprived of their civil rights.*

The only way left open to traders who have had the misfortune to fail, to remove the stain of bankruptcy from their name, and to regain their civil rights, is to pay their debts in full, both capital and interest.

In that case the Imperial Court, upon the production of the receipts, solemnly pronounces a decree of rehabilitation, which restores the former bankrupt, relieved from all imputations on his conduct, to an honourable position in society.

In concluding this chapter we may observe that the exercise of the right of creditors, French or foreign, against an insolvent debtor, is most simple and easy.

Those creditors who are on the spot are not obliged to incur the least expense, of whatsoever nature, to prove their debts, obtain the admission of them, and share in the distribution of the estate.

The creditors who are not on the spot, and the foreign creditors, may appear by deputy authorized by letter of attorney (*procuration*), which costs only a few francs.

We trust that this summary of the provisions of the Commercial Law of France, and of the usages connected with it, may answer the purpose for which it is intended, and which we have stated in the Preface. We beg to remind our readers that we promised them a compendium of the law, free from all technical dissertations and disquisitions, and such as may suffice for the requirements of international commerce. We shall feel pleased indeed, if it is allowed that this promise of ours has been redeemed by the briefness, clearness, and precision of the present little work.

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THE END.